United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

10-30-68
(3)

APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

385

No. 21,781

GLAZIERS' LOCAL NO. 558, a/w Brotherhood of Painters, Decorators and Paperhangers of America, AFL–CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

No. 21,883

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

GLAZIERS' LOCAL NO. 558, a/w Brotherhood of Painters, Decorators and Paperhangers of America, AFL–CIO,
Respondent

On Cross-Petitions for Review and Enforcement of a Decision and Order of the National Labor Relations Board

DAVID S. BARR
WILLIAM B. PEER
1825 K Street, N. W.
Washington, D.C. 20006

LEWIS F. GRAYSON
6333 Tholozan Street
St. Louis, Missouri

Attorneys for Petitioner in No. 21,781 and Respondent in No. 21,883.

Of Counsel:

BARR & PEER
1825 K Street, N. W.
Washington, D.C. 20006

THE CASILLAS PRESS, INC. – 1717 K Street, N. W. – Washington, D. C. 20006

TABLE OF CONTENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GLAZIERS' LOCAL NO. 558, a/w BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 21,781
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. GLAZIERS' LOCAL UNION NO. 558, a/w BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO, Respondent.	No. 21,883

PREHEARING CONFERENCE STIPULATION

Pursuant to Rule 38(K) of the Rules of this Court, the parties, subject to the Court's approval, hereby stipulate and agree as follows:

I. ISSUE

The question presented in Case Nos. 21,781 and 21,883 is:

Whether the Board properly found that the Union induced and encouraged individuals employed by persons engaged in commerce or in an industry affecting commerce to engage in a strike or re-

fusal to perform services, and coerced or restrained persons engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring Royse to cease doing business with Sharp Bros., forcing or requiring Sharp Bros. to cease using, handling or otherwise dealing in Cupples' products and to cease doing business with B. D. & R., and forcing or requiring B. D. & R. to cease doing business with Cupples, in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

II. JOINT APPENDIX

1. The record in this case shall be reduced to a joint appendix to be comprised of the following materials: the Board's Decision and Order, the Motion To Transfer Proceeding To The Board And Stipulation Of The Parties and the exhibits attached thereto, this stipulation and the Court's order thereon. The record shall be prepared by the Xerox method provided for in Rule 16(j) of this Court. The Union and the Board shall divide equally the costs of reproducing the joint appendix.

2. Pursuant to Rule 16(j), seven copies of the joint appendix will be filed with the Court. The Union shall be responsible for reproducing and filing the joint appendix which it will file by the date its reply brief is due.

III. THE BRIEFS

The parties agree that the briefs may initially be filed in typewritten form. Printed copies of all briefs shall be filed and served by the date the reply briefs are due. Since the Xerox method will be used for the preparation of the joint appendix, record references in the brief shall follow the pagination of the original record materials.

Marcel Mallet-Prevost

Dated at Washington, D. C.,
this 10 day of June, 1968.

Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

David S. Barr

Dated at Washington, D. C.,
this 10 day of June, 1968.

David S. Barr, Esquire
Counsel for Glaziers' Local Union No. 558, a/w Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,781 September Term, 1967

Glaziers' Local No. 558, a/w
Brotherhood of Painters, Decorators
and Paperhangers of America, AFL-CIO,
Petitioner,

v.

National Labor Relations Board,
Respondent.

No. 21,883

National Labor Relations Board,
Petitioner,

v.

Glaziers' Local No. 558, a/w
Brotherhood of Painters, Decorators
and Paperhangers of America, AFL-CIO,
Respondent.

Before: Wright, Circuit Judge, in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled cases having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in these cases unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTEENTH REGION

GLAZIERS LOCAL 558, affiliated with
BROTHERHOOD OF PAINTERS, DECORATORS
AND PAPERHANGERS OF AMERICA, AFL-CIO
(Sharp Bros. Contracting Co.)

and

Case No. 17-CC-269

BUILDERS' ASSOCIATION OF KANSAS CITY

MOTION TO TRANSFER PROCEEDING TO THE BOARD AND STIPULATION OF PARTIES

Comes now Glaziers Local 558, affiliated with Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO (the Respondent herein), Builders' Association of Kansas City (the Charging Party herein), and Counsel for the General Counsel, being all the parties to this proceeding, and hereby petition the Board, in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay, to exercise its powers under Section 102.50 of the Board's Rules and Regulations, Series 8, as amended, and to transfer and continue this proceeding to, and before, the Board.

The parties agree that the Charge, the Complaint and Notice of Hearing, the Answer, Amendment to Complaint (attached hereto and marked Joint Exhibits Nos. 1, 2, 3 and 4), the attached Respondent's Exhibits Nos. 1, 2, 3, 4 and 5; and the attached General Counsel's Exhibits Nos. 1, 2 and 3, and the Stipulation set out below, shall constitute the entire record in the case and that no oral testimony is necessary or desired by any of the parties. With respect to the aforementioned Amendment to Complaint, Respondent admits subparagraphs (e) and (f) of paragraph II, and subparagraph (c) of paragraph IV of the Complaint, as amended, but Respondent denies paragraph VII of the Complaint, as amended. The parties further stipulate that they waive a hearing before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner,

and the issuance of a Trial Examiner's Decision and Recommended Order; and desire to submit this case for findings of fact, conclusions of law, and order, directly to the Board.

In the event the Board grants this motion, the parties request that the Board set the date for filing of briefs to be twenty-one (21) days after the Board's order granting this motion.

STIPULATION

In conformity with the foregoing motion and to supplement the facts admitted by the Respondent's Answers to Complaint, the parties hereto do hereby stipulate and agree as follows:

1. Ralph McGee is, and at all times material herein has been, Business Representative and an agent acting on Respondent's behalf.

2. At all times material herein, the following-named individuals have held the positions set opposite their names for the Employers indicated at the Rockhill Medical Office Building, 6700 Troost Avenue, Kansas City, Missouri job site: (herein referred to as the job site)

DONNELL JAMES - Job Superintendent for Sharp Bros.

DON SHARP - President of Sharp Bros.

MIKE ROYSE - Foreman in charge of Royse's operations at the job site.

FRED SCHOONOVER - Foreman for Evans Electrical Company, the electrical subcontractor on the job site.

CHARLES PLATZ - Oiler and motor crane operator for Royse.

3. On or about March 29, 1966, pursuant to a contract with B. D. & R. Engineering Corporation, Sharp Bros. received a shipment of two hundred sixty-six (266) Theam L. Seal Windows from the Cupples Products Corporation at the job site. These are aluminum factory preglazed windows manufactured by the Cupples Products

Corporation. The B. D. & R. Engineering Corporation is the sales agent for Cupples in the Kansas City area. The aforementioned windows were delivered to the job site by common carrier. Sharp Bros.' contract for the erection of the Rockhill Medical Center specified that Cupples preglazed windows be used.

4. Ralph McGee would testify that, on or about the middle of April 1966, he visited the job site and talked to Donnell James. McGee was informed the windows to be installed came from the Cupples Corporation already glazed. McGee informed James he had heard Cupples was paying substandard wages for shop glazed windows and that he (McGee) was going to contact his attorney to see if there was any way he could advertise this fact to the public. On April 26, 1966, McGee sent a letter to Cupples Products Corp., return receipt requested (a copy of the letter is attached hereto as Respondent's Exhibit No. 1). McGee would testify he never received an answer from Cupples. On May 12, 1966, McGee mailed out letters to various business agents who are members of the Building Trades Council in Kansas City. A copy of the letter is attached hereto as Respondent's Exhibit No. 2. McGee would also testify that he addressed a meeting of the Building Trades Council in Kansas City, Missouri, on May 12, 1966. At this meeting, McGee informed the member business agents of the various crafts that he was going to picket the job site. McGee informed the members that the picket would mean just what it said and that he (McGee) did not want anyone to leave the job. McGee would also testify that the same day he visited the job site with four other business agent members of the Building Trades Council and informed several of the employees on the job site that the job would be picketed, Monday, May 16, for publicity purposes only and he wanted them to stay on the job. McGee would testify he personally carried the picket sign on May 16, 1966 (picture of picket sign attached hereto as General Counsel's Exhibit No. 1) and, to the best of his knowledge, no one left the job that day.

5. Don Sharp would testify that the picket referred to above first appeared at the job site on May 16, 1966. Sharp would also testify the picketing continued without incident until 2:30 p.m. on May 19, 1966, when Sharp's engineer, oiler, and two iron workers walked off the job. Sharp would testify that, when the engineer and oiler left the job, he had no one to operate the motor crane to lift the building materials to the upper floors of the building under construction, so he sent the rest of his employees home. Sharp would also testify the picket was present at 8:30 a.m. on May 20, 1966, and Sharp's engineer and oiler refused to work. Sharp therefore sent the rest of his employees home. Sharp would testify the picket was not present from May 20 to May 27, 1966, and his employees worked without incident during this period. Sharp would also testify the picket next appeared on May 27, 1966, at 8:30 a.m. Sharp's engineed would not work and, since Sharp could not operate the crane, he sent the rest of his employees home. Sharp would testify the picket next appeared at the job site at 2:00 p.m., May 31, 1966. Sharp would testify,when the picket appeared, his engineer shut down the operating crane and left the job. Sharp sent the rest of his employees home. Sharp would testify the same thing occurred on June 1 and 2, 1966.

6. Donnell James would testify he first saw the picket sign on May 16, 1966, at the job site. The sign was carried by McGee. McGee also passed out handbills (copy attached hereto as General Counsel's Exhibit No. 2). There was no work stoppage that day.

The man carrying the picket sign (which sign at all times was same as the one shown in General Counsel's Exhibit No. 1) would walk on Troost Avenue, going north and south. The picket would walk back and forth on Troost Avenue, covering the length of the job site. This would include the entrance driveway to the job site used by all employees (picture of the job site attached hereto as General

Counsel's Exhibit No. 3). James would testify the first work stoppage occurred about 2:30 p.m., May 19, 1966, when his engineer and two iron workers left the job. Royse's engineer also left. Royse and Sharp sent the rest of their employees home.

7. Mike Royse would testify that, during the afternoon of May 19, 1966, after the picket appeared on the job, his engineer and oiler ceased working and left the job site. Royse would further testify that, once the engineer leaves the job, the motor crane cannot be operated, so he sent the rest of his employees home. This would total about fourteen employees for Royse who were sent home.

8. Donnell James would further testify that, on May 20, 1966, the picket appeared at about 8:30 a.m. Sharp Bros.'engineer, Harry Mansfield, refused to cross the picket line to work. Mike Royse would testify that, on this date, his engineer, Long, and oiler, Platz, would not cross the picket line to work. James and Royse sent the rest of their employees home because, without the engineers to operate the crane, they have no way of getting the building materials to the upper floors of the building under construction.

9. Ralph McGee would further testify that he had no knowledge of any work stoppage on May 19, 1966. On May 20, McGee received a phone call from the picket informing him that "some of the people on the job wouldn't work." McGee would testify that he instructed the picket to take the banner down and put it in the car, and that he would be there in ten minutes. McGee would testify that, when he arrived at the job site, he saw one employee leaving. McGee informed the men the picket line was there only to advertise and he didn't want anyone to leave. McGee would testify he returned to his office and sent two telegrams, one to Hoisting Engineers Local 101 and one to Sharp Bros. Copies attached as Respondent's Exhibits Nos. 3 and 4. McGee would testify he then kept the picket off the job until either May 26 or May 27, 1966.

10. Charles Platz, oiler for Royse, would testify that the first few days the picket was there, everybody worked. The picket usually showed up after the employees went to work. The picket would give out pamphlets which stated for us to keep working. Platz would also testify that the latter part of May (exact date unknown), the picket showed up before they went to work. Platz and Long decided to call their union, Local 101, to see what to do. Platz and Long were unable to contact their agent. Platz and Long decided not to work until they heard from their Union. The next day, when they reported back, the picket was off, so they worked. Platz would also testify that "a day or two later, the picket was back before we went to work. The Union, Hoisting Engineers (Local 101) had not told us what to do, so we didn't start to work." At this time, according to Platz, the Business Agent for the Glaziers, Local 558 showed up. He gave us a pamphlet saying we were supposed to go to work. Long and Platz worked the rest of the day without incident. Platz would also testify that "a day or two later" (date unknown), the picket showed up about 1:30 p.m. Platz finished unloading the truck with the crane, then shut the crane down and went home. Platz would testify he lost about three hours work that day.

11. Mike Royse would further testify that, on or about May 20, 1966, on a Friday, two trucks of precast concrete arrived at the job site from Omaha, Nebraska. Since the crane operator and oiler had left the job, Royse called Wilson Concrete in Omaha, Nebraska, and informed the Wilson Company he could not unload the trucks as a picket was on. Wilson Company informed Royse to send the trucks back loaded. Royse would also testify the following Monday, the picket was not on, so he contacted Wilson Company and the trucks returned to the job site and were unloaded.

12. Mike Royse would further testify that the picket, after the May 20 incident, next appeared on May 27, 1966. Royse states his engineer and oiler were at work but, when the picket

appeared, they ceased working. Royse placed a call to McGee about the picket. Royse would testify that McGee asked him to hold his employees there, that he (McGee) would be there in ten minutes. McGee showed up at the job site. Royse would testify that McGee passed out pamphlets and told the men there was no reason to quit work. Royse would testify his engineer left the job. Royse sent the rest of his men home and left himself.

13. Fred Schoonover, foreman for Evans Electrical Construction Company, holder of a subcontract with Sharp Bros. to perform electrical work on the job site, would testify that he had seven electricians working on the job site. Schoonover would testify that about a week before the picketing started, McGee contacted him and informed him the picketing was for advertising only. Schoonover would testify McGee informed him to ignore the picket. Schoonover would testify that neither he nor his seven electricians left the job during the picketing. Schoonover would testify that the first time he recalled a work stoppage (date unknown), McGee shortly afterwards appeared on the job site. McGee informed the men that his intention was that the picket was not to be honored in any way. McGee stated this was for advertising only. Schoonover would also testify that McGee stated he would contact Local 101 and tell them the same thing. Schoonover would testify that he "believed there were three or four work stoppages, and each time McGee would immediately pull the picket."

14. Donnell James would further testify that, on June 1, 1966, the picket appeared and the engineer would not report to work so his company did not start working that day. James would also testify that, on June 2, 1966, the picket appeared at 8:30 a.m. and Sharp's engineer refused to work. James sent his men home and closed the job. The picket left after 9:45 a.m.

15. The parties hereto all stipulate that at no time have any of Cupples employees been on the job site, nor are Cupples products sold to the public from this job site.

16. During the period May 16, 1966 to June 2, 1966, the Respondent also picketed the B. D. & R. Engineering Corporation at its Kansas City, Kansas location. The picket sign used by Respondent at this location read as follows:

"Notice to the Public. For Information Purposes Only. The B. D. & R. Engineering Company is selling Cupples Products Corp. Glazed Windows Whose Employees Are Receiving Sub-Standard Wages and Conditions Being Paid In the Glazing Industry In This Area. Please Help Us Maintain Our Wages and Conditions. Do Not Buy Cupples Products Corp. Windows. Glaziers & Glassworkers Local No. 558."

17. The Respondent, at the time of the picketing at B. D. & R. Engineering Corporation mentioned above in paragraph 16, also passed out handbills at this location. Copy is attached hereto as Respondent's Exhibit No. 5.

18. All parties stipulate and agree that there has been no picketing since June 2, 1966, at the job site.

19. This stipulation is made without prejudice to any objection that any party may have as to the materiality or competency of any facts stated.

20. McGee would also testify that the picket sign was not only directed to the general public, but to the contractors up on the job site, and suppliers, architects, engineers, employees, and any and all other persons having business at the job site.

Respectfully submitted,

GLAZIERS LOCAL 558, affiliated with
BROTHERHOOD OF PAINTERS, DECORATORS,
AND PAPERHANGERS OF AMERICA, AFL-CIO

Signed this _____
day of September, 1966.

By_____
Frank Grayson, its Attorney
515 Center Building
Tulsa, Oklahoma

BUILDERS ASSOCIATION OF KANSAS CITY

Signed this _____
day of September, 1966.

By_____
James L. Hutton,
Assistant to the Managing Director
Room C, Rialto Building
906 Grand Avenue
Kansas City, Missouri 64106

Signed this _____
day of September, 1966.

_____
Robert L. Uhlig,
Counsel for the General Counsel
National Labor Relations Board
Seventeenth Region
610 Federal Building
601 East 12th Street
Kansas City, Missouri 64106

FORM NLRB-508
(2-60)

Form Approved
Budget Bureau No. 64-R003.11

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: *File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.*

DO NOT WRITE IN THIS SPACE

CASE NO. 17-CC-269

DATE FILED June 1, 1966

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

NAME
GLAZIERS LOCAL 558, AFL-CIO

ADDRESS *(Street, City, State and ZIP Code)*
4941 Prospect, Kansas City, Missouri

THE ABOVE-NAMED ORGANIZATION(S) OR ITS AGENTS HAS (HAVE) ENGAGED IN AND IS (ARE) ENGAGING IN UNFAIR LABOR PRACTICES WITHIN THE MEANING OF SECTION 8(b) SUBSECTION(S) 4 (i) (ii) B *(List subsections)* OF THE NATIONAL LABOR RELATIONS ACT, AND THESE UNFAIR LABOR PRACTICES ARE UNFAIR LABOR PRACTICES AFFECTING COMMERCE WITHIN THE MEANING OF THE ACT.

2. BASIS OF THE CHARGE *(Be specific as to facts, names, addresses, plants involved, dates, places, etc.)*

The above-named labor organization has by picketing and other means induced and encouraged employees of Sharp Bros. Contracting Co. and other employers at Rockhill Medical Bldg. to engage in a strike and a concerted refusal to perform services with an object of forcing Sharp Bros. Contracting Co. to cease using, selling, handling, transporting or otherwise dealing in the products of Cupples Products Corporation and to cease doing business with Cupples Products Corporation and to force Sharp Bros. Contracting Co. to assign glazing work to employees of Local 558 when such glazing work has already been performed by employees of Cupples Products Corporation in another labor organization.

NATIONAL LABOR RELATIONS BOARD
Docket No. 17-CC-269 OFFICIAL EXHIBIT NO. GC-10
Disposition: Identified ✓ Received ✓ Rejected
In the matter of Builders Assn of K.C.
Date 9/29/66 Witness — Reporter GH
No. Pages 1

3. NAME OF EMPLOYER
Sharp Bros. Contracting Co., 1014 E. 19th Street, Kansas City, Missouri

4. LOCATION OF PLANT INVOLVED *(Street, City, State, and ZIP Code)*
6700 Troost Ave., Kansas City, Missouri

5. TYPE OF ESTABLISHMENT *(Factory, mine, wholesaler, etc.)*	6. IDENTIFY PRINCIPAL PRODUCT OR SERVICE	7. NO. OF WORKERS EMPLOYED
Construction	Building	

8. FULL NAME OF PARTY FILING CHARGE
Builders' Association of Kansas City

9. ADDRESS OF PARTY FILING CHARGE *(Street, City, State and ZIP Code)*	10. TEL. NO.
906 Grand, Room C, Kansas City, Missouri	VI. 2-4436

11. DECLARATION

I DECLARE THAT I HAVE READ THE ABOVE CHARGE AND THAT THE STATEMENTS THEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

BY [signature] *(Signature of representative or person making charge)*

June 1, 1966 *(Date)*

Assistant Managing Director *(Title or office, if any)*

WILFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001)

GPO 869-936

JOINT EXHIBIT 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTEENTH REGION

GLAZIERS LOCAL 558, affiliated with
BROTHERHOOD OF PAINTERS, DECORATORS
AND PAPERHANGERS OF AMERICA, AFL-CIO
(Sharp Bros. Contracting Co.)

and Case No. 17-CC-269

BUILDERS' ASSOCIATION OF KANSAS CITY

COMPLAINT AND NOTICE OF HEARING

It having been charged by Builders' Association of Kansas City (herein called Builders) that Glaziers Local 558, affiliated with Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO (herein called the Respondent) has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq. (herein called the Act), the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the Regional Director for the Seventeenth Region, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended:

I

The charge herein was filed by Builders on June 1, 1966, and served by registered mail upon the Respondent the same date.

II

(a) Sharp Bros. Contracting Co. (herein called Sharp Bros.) is engaged as a general contractor in the building and construction industry with its principal office located in Kansas City, Missouri. In the operation of its business, Sharp Bros. annually purchases goods and materials from outside the State of Missouri valued in excess of $50,000.

(b) Royse Masonry Co., Inc. (herein called Royse) is engaged in the building and construction industry as a masonry contractor. In the course and conduct of its business, Royse annually purchases goods and materials valued in excess of $50,000 from outside the State of Missouri.

(c) Builders is, and at all times material herein has been, an association of employers, individuals, firms and corporations, engaged in, or connected with, the building and construction industry and related business. Builders bargains collectively on behalf of its members with various labor organizations, and has been doing so at all times material herein. Sharp Bros. and Royse are, and at all times material herein have been, members of Builders.

(d) Cupples Products Corporation (herein called Cupples) is a Missouri corporation engaged in St. Louis County, Missouri, in the manufacture and distribution of aluminum products, including preglazed aluminum windows. In the operation of its business, Cupples annually ships products valued in excess of $50,000 directly from its place of business in St. Louis County, Missouri, to purchasers located in states other than the State of Missouri.

(e) Sharp Bros., Royse, Cupples, and Builders are, and at all times material herein have been, Employers engaged in commerce within the meaning of Sections 2(6) and 2(7) of the Act.

III

The Respondent is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

IV

(a) Sharp Bros., at all times material herein, has been engaged as a general contractor in constructing the Rockhill Medical Center located at 6700 Troost Avenue, Kansas City, Missouri (herein called the job site).

(b) Royse, at all times material herein, has been engaged as a subcontractor on the job site, engaged in performing the masonry work and erection of precast panels for Sharp Bros.

(c) In the course and conduct of its business, preglazed windows manufactured by Cupples are being utilized, have been utilized, and will be utilized by Sharp Bros. at the job site.

V

(a) The Respondent, at all times material herein, has had a labor dispute with Cupples because Cupples manufactures preglazed windows.

(b) In support of its labor dispute with Cupples, since on or about May 16, 1966, the Respondent has engaged in picketing of the job site.

(c) At no time during the picketing mentioned above, were any employees of Cupples at work on the job site.

VI

(a) By the acts and conduct set forth in paragraph V above, and by each of said acts, the Respondent did induce and encourage, and is inducing and encouraging, individuals employed by Sharp Bros., Royse, and other persons engaged in commerce, or industries affecting commerce, to engage in a strike or a refusal in the course of their employment to use, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services.

(b) By the acts and conduct set forth in paragraph V, above, and by each of said acts, the Respondent did threaten, coerce, and restrain, and is threatening, coercing, and restraining, Sharp Bros., Royse and other persons engaged in commerce or in industries affecting commerce.

VII

An object of each of the acts and conduct described in paragraphs V and VI above, was, and is, to force and require Sharp

Bros. and Royse to cease doing business with Cupples and/or to force or require Royse and other persons engaged in commerce to cease doing business with Sharp Bros. to force or require Sharp Bros. to cease doing business with Cupples.

VIII

(a) By the acts and conduct described in paragraphs V and VI above, for the object described in paragraph VII above, the Respondent did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i)(B) of the Act.

(b) By the acts and conduct described in paragraphs V and VI above, and by each of said acts, for the object described in paragraph VII above, the Respondent did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) of the Act.

IX

The acts of the Respondent complained about above, and each of said acts occurring in connection with the operations of Sharp Bros., Royse, and Cupples, as described above in paragraph II, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

X

The acts of the Respondent complained about above constitute unfair labor practices affecting commerce within the meaning of Sections 8(b)(4)(i)(ii)(B), 2(6), and 2(7) of the Act.

PLEASE TAKE NOTICE that on September 29, 1966, at 10:00 a.m. (CST), at

Regional Office Hearing Room
601 Federal Building
601 East 12th Street
Kansas City, Missouri

a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's said Rules and Regulations, the Respondent shall file with the said Regional Director, an original and four (4) copies of an answer to said complaint within ten (10) days from the service thereof, and that, unless the Respondent does so, all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated: August 30, 1966

Martin Sacks,
Regional Director
National Labor Relations Board
Seventeenth Region
610 Federal Building
601 East 12th Street
Kansas City, Missouri 64106

(SEAL)

BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTEENTH REGION

GLAZIERS LOCAL 558, affiliated with
BROTHERHOOD OF PAINTERS, DECORATORS
AND PAPERHANGERS OF AMERICA, AFL-CIO
(Sharp Bros. Contracting Co.)

and

Case No. 17-CC-269

BUILDER'S ASSOCIATION OF KANSAS CITY

ANSWER

Comes now Respondent herein, and for its Answer to the Complaint, alleges and states:

1. Respondent admits paragraph 1. of said Complaint.

2. Respondent admits sub-paragraph (a) of paragraph 2. of said Complaint; Respondent admits sub-paragraph (b) of paragraph 2. of said Complaint; Respondent admits sub-paragraph (c) of paragraph 2. of said Complaint; Respondent admits to sub-paragraph (d) of paragraph 2. of said Complaint; Respondent admits sub-paragraph (e) of paragraph 2. of said Complaint.

3. Respondent admits paragraph 3. of said Complaint.

4. Respondent admits sub-paragraph (a) of paragraph 4. of said Complaint; Respondent admits sub-paragraph (b) of paragraph 4. of said Complaint; Respondent admits sub-paragraph (c) of paragraph 4. of said Complaint.

5. Respondent denies each and every allegation contained in paragraphs 5, 6, 7, 8, 9 and 10 of said Complaint.

WHEREFORE, Respondent having fully answered herein, prays that the Complaint as issued herein be dismissed in its entirety.

Dated this 9th day of September, 1966.

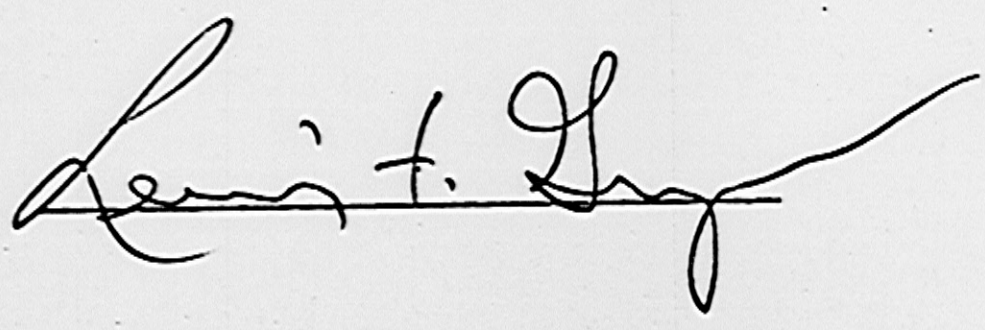
LEWIS F. GRAYSON
Attorney for Respondent

NATIONAL LABOR RELATIONS BOARD
Docket No. 17-CC-269 OFFICIAL EXHIBIT NO. 1A-R
Disposition: Identified / Received / Rejected
In the Matter of Builder's Assn of KC
Date 2/23/67 Witness ____ Reporter ____
No. Pages 2

JOINT EXHIBIT 3

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of September, 1966, I mailed a true and correct copy of the above and foregoing Answer to Martin Sacks, Regional Director, National Labor Relations Board, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri; John S. Adams, Assistant Managing Director, Builders' Association of Kansas City, 906 Grand Avenue, Room C, Kansas City, Missouri; Glaziers Local 558, 4941 Prospect, Kansas City, Missouri; Sharp Bros. Contracting Co., 1014 East 19th Street, Kansas City, Missouri; Royce Masonry Co., Inc., 126th and State Line, Stilwell, Kansas; Cupples Products Corporation, 2650 South Hanley Road, St. Louis, Missouri.



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTEENTH REGION

GLAZIERS LOCAL 558, affiliated with
BROTHERHOOD OF PAINTERS, DECORATORS
AND PAPERHANGERS OF AMERICA, AFL-CIO
(Sharp Bros. Contracting Co.)

and Case No. 17-CC-269

BUILDERS' ASSOCIATION OF KANSAS CITY

AMENDMENT TO COMPLAINT

A Complaint and Notice of Hearing having been issued on August 30, 1966,

IT IS HEREBY ORDERED pursuant to Section 102.17 of the Board's Rules and Regulations, Series 8, as amended, that the Complaint be, and the same hereby is, amended in the following respects:

1. Subparagraph (e) of paragraph II is stricken and in its place are substituted the following subparagraphs:

(e) B.D.&R. Engineering Corporation (herein called B.D&R.) a Missouri corporation, with its principal office located in Kansas City, Kansas, is engaged in the business of supplying building materials for use in the building and construction industry. In the operation of its business, B.D.&R. annually ships products valued in excess of $50,000 directly from its place of business in Kansas City, Kansas to purchasers located in states outside the State of Kansas.

(f) Sharp Bros., Royce, Builders, Cupples and B.D.&R., and each of them, are, and at all times material herein have been, Employers engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act.

2. Subparagraph (c) of paragraph IV is amended to read as follows:

(c) In the course and conduct of its business Cupples' preglazed windows, supplied by B.D.&R. are being utilized, have been

utilized, and will be utilized by Sharp Bros. at the job site.

3. Paragraph VII is amended to read as follows:

VII.

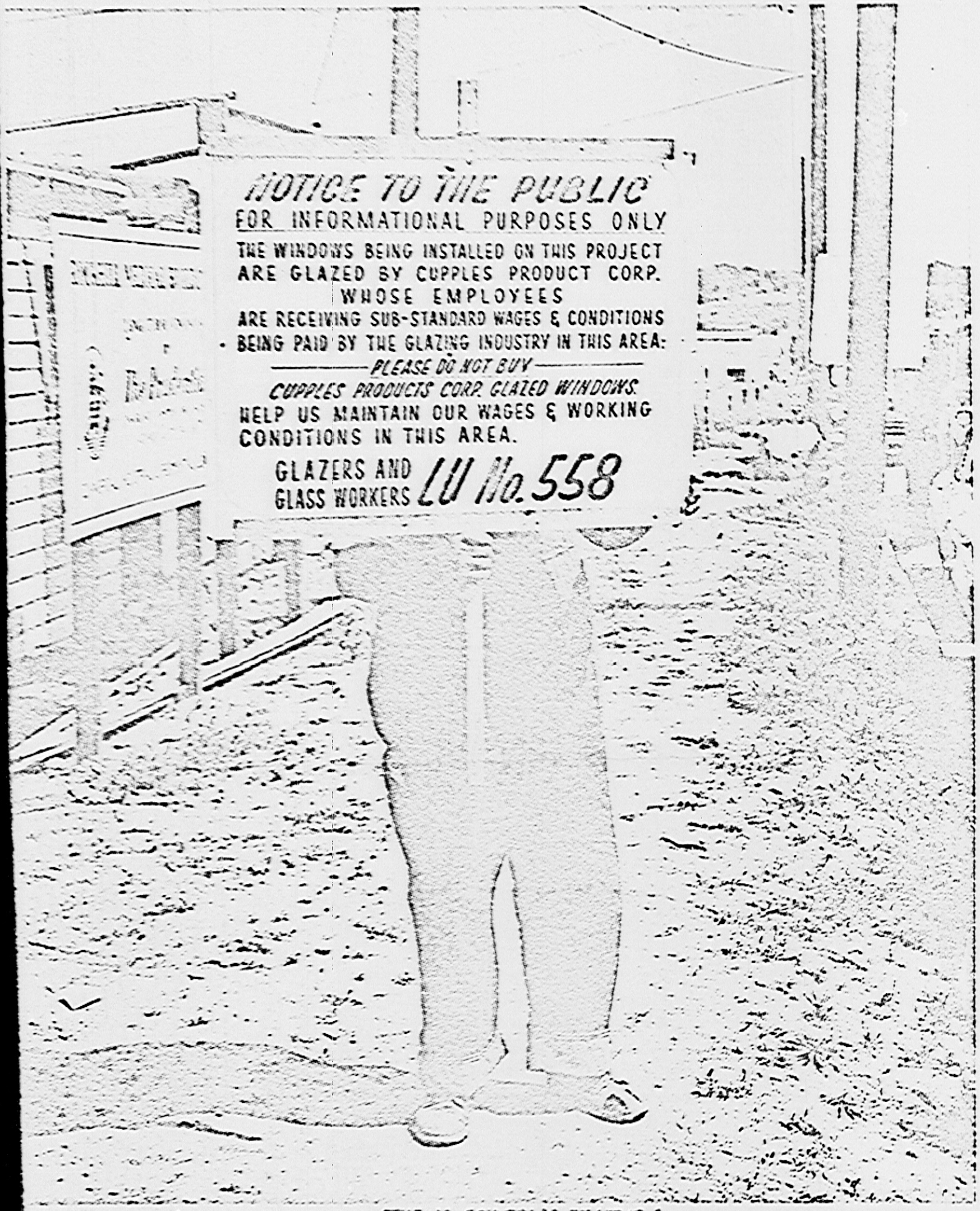
Objects of each of the acts and conduct described in paragraphs V and VI above, were, and are, to force or require Royse and other persons engaged in commerce to cease doing business with Sharp Bros., to force or require Sharp Bros. to cease using, handling or otherwise dealing in the products of Cupples and to cease doing business with B.D.&R., and to force or require B.D.&R. to cease doing business with Cupples.

Martin Sacks.

Dated: September 13, 1966.

Martin Sacks
Regional Director
National Labor Relations Board
Seventeenth Region
610 Federal Building
601 East 12th Street
Kansas City, Missouri 64106

(SEAL)



GENERAL COUNSEL'S EXHIBIT 2

ANDERSON PHOTO COMPANY

The picketing being conducted here is to advertise to the buying public that Cupples Products Corporation windows are glazed by employees receiving sub-standard wages and conditions that are being paid in this area.

Therefore we urge all employees employed on this project or making deliveries on this project to cross the picket line and perform all services as required by their employers.

Under no circumstances are we attempting to force or require any company to cease doing business with Cupples Products Corporation, but our sole and only object is to request that the buying public do not buy Cupples factory glazed windows.

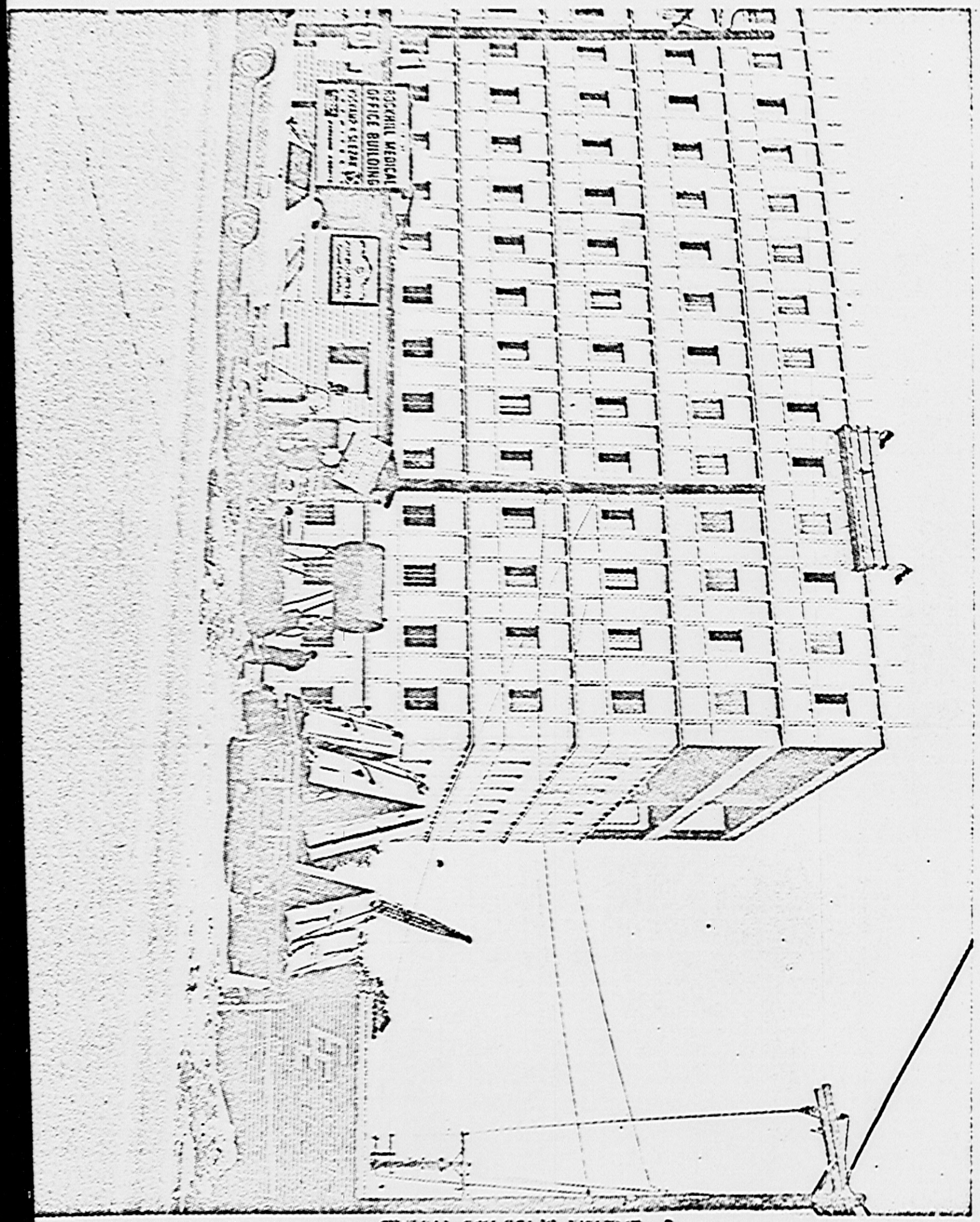
Glaziers and Glassworkers Local Union No. 558

4941 PROSPECT KANSAS CITY, MISSOURI

USE THIS HANDBILL ON JOB

65

GENERAL COUNSEL'S EXHIBIT 2



GENERAL COUNSEL'S EXHIBIT 3

April 26, 1966

Cupples Product Corp.
2650 So. Hanley Rd.
St. Louis, Missouri

Gentlemen:

It has come to our attention that your pre-glazed windows are being distributed by B-D-R Engineering Corp., 1933 No. 10th, Kansas City, Kansas.

It is our further understanding that your employees glazing such windows are receiving wages and conditions substantially less than that now being paid in the industry.

If the above is not true please furnish us such information that will prove you are paying the prevailing wage and conditions by May 2, 1966 or we will assume such is not the case and will consider picketing in an informational basis all establishments using your product and any distributor of your product in the Kansas City area.

This is not an attempt to organize your employees or obtain a collective bargaining agreement with your company.

Sincerely,

GLAZIERS LOCAL UNION No. 558

Ralph G. McGee, Bus. Rep.

cc: B-D-R Engineering Corp.

RESPONDENT'S EXHIBIT 1

GLAZIERS LOCAL UNION NO. 558

Brotherhood of Painters, Decorators and Paperhangers of America
4941 Prospect
Kansas City, Mo. 64130

RALPH McGee
ness Representative & Rec. Sec.

Phone WA. 1-4755
AFL-CIO 63

Date May 12, 1966

Dear Sir and Brother:

It is the intention of our Local Union No. 558 to place an informational picket at the construction site of Sharp Brothers located at 6640 Troost, Kansas City, Missouri.

The purpose of the picketing is to inform the public that the windows being installed at the above project have been glazed by employees of the Cupples Product Corporation receiving sub-standard wages and conditions substantially less than is now being paid in this area.

Our purpose in such informational picketing is to inform the public and is not to require or encourage any of your members or any individual or company to refuse to cross said picket line. Therefore, we request you advise your members who are or may be employed at this construction site not to refuse to cross such picket line or refuse to offer their service to their respective employers by reason of such picketing.

Fraternally yours,

Glaziers & Glassworkers
Local Union No. 558

Ralph McGee

Ralph G. McGee, Bus. Rep.

RESPONDENT'S EXHIBIT 2

MD 9 PD MAY 2 1233P CST

HOISTING ENGINEERS LOCAL 101

101 EAST ARMOUR BLVD KSC

HAVE REMOVED PICKED FROM JOB AT 67TH AND TROOST.

RALPH MCGEE,
GLAZIERS LOCAL UNION 558

WAB 1-4755
SIGN PAINTERS LOCAL UNION "820

GLAZIERS LOCAL UNION #558 4941 PROSPECT KSC

CFNFURN

Copy

RESPONDENT'S EXHIBIT 3

SH 21 PD 2EX N MAY 20 1150 CST

HAVE REMOVED PICKET FROM JOB AT 67TH AND TROOST

DOING EVERYTHING I CAN TO GET MEN BACK TO WORK

RALPH MCGEE GLAZIERS LOCAL UNION NO. 558

SHARP BROS. CONST CO. 1014 EAST 19TH ST KSC

VOSKAMP AND SLEZAK 18 EAST 11TH ST KSC

CHG WAB 1 4755

SIGN PAINTERS

4941 PROSPECT

KANSAS CITY MO

BOOK OF 2

Copy

RESPONDENT'S EXHIBIT 4

TO THE PUBLIC

The picketing being conducted here is to advertise to the buying public that Cupples windows being sold by the B. D. & R. Engineering Co. are being glazed at a sub-standard wage rate.

We are not asking the employees employed by this Company or any other personnel doing business with this Company to refuse to work or to refuse to perform any service connected with the Company.

We request that all employees employed by the Company cross the picket line and perform all services required by their employer. We appeal to the public to help maintain the work standards established by our organization.

Therefore we request that the buying public does not buy Cupples Products Corporation's factory glazed windows.

Local Union No. 558

Glaziers and Glassworkers

4941 PROSPECT KANSAS CITY, MISSOURI

65

RESPONDENT'S EXHIBIT 5

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GLAZIERS' LOCAL NO. 558, affiliated
WITH BROTHERHOOD OF PAINTERS, DECORATORS
AND PAPERHANGERS OF AMERICA, AFL-CIO
(SHARP BROS. CONSTRUCTION CO.)

Case No. 17-CC-269

BUILDERS' ASSOCIATION OF KANSAS CITY

DECISION AND ORDER

Upon charges duly filed by the Builders' Association of Kansas City, hereinafter called Builders or the Charging Party, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, issued a complaint dated August 30, 1966, against Glaziers' Local Union No. 558, affiliated with the Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, hereinafter called the Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing were served upon Respondent and the Charging Party. On September 9, 1966, the Respondent filed its answer to the complaint. The complaint was amended on September 13, 1966, and duly served on the parties.

On September 29, 1966, the Respondent, General Counsel, and the Charging Party entered into a stipulation of the testimony of all witnesses pertinent to the dispute. These parties also waived a hearing before a Trial Examiner and agreed that the charge, complaint, and stipulation shall constitute the entire record in the case. They further agreed to submit the stipulated record directly to the Board for findings of fact, conclusions of law, and a Decision and Order. By an order dated October 5, 1966, the Board approved the stipulation and transferred the case to itself. Thereafter, the General Counsel filed a brief.

Upon the basis of the stipulation and the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of the Employers

Cupples Products Corporation, hereinafter called Cupples, is engaged in the manufacture of preglazed windows and doors. At all material times herein, Cupples supplied preglazed windows to B. D. & R. Engineering Corporation, hereinafter called B. D. & R., a wholesale distributor of building materials for use in the building and construction industry. In the operation of its business, B. D. & R. annually ships products valued in excess of $50,000 from its place of business in Kansas City, Kansas, to points outside the State of Kansas.

Among B. D. & R.'s purchasers during the pertinent period was Sharp Bros. Contracting Co., hereinafter called Sharp Bros., which was engaged as the general contractor in the construction of an office building in Kansas City, Missouri. Sharp Bros. annually makes interstate purchases of goods and materials valued in excess of $50,000. Sharp Bros. is a member of Builders which bargains with various labor organizations for an association of employers, individuals, firms and corporations engaged in the building industry. Royse Masonry Co., Inc., hereinafter called Royse, is also a member of Builders and was engaged by Sharp Bros. to do the masonry work at the construction site. Royse annually purchases goods and materials valued in excess of $50,000 from outside the State of Kansas.

The parties stipulated, and we find, that B. D. & R., Sharp Bros., Builders, and Royse are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find they are persons engaged in the construction industry affecting commerce, within the meaning of Section 8(b)(4) of the Act.

II. The Labor Organization Involved

Respondent is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

About the middle of April 1966, a business agent of the Respondent visited the jobsite where Sharp Bros. was constructing an office building and the business agent told the job superintendent that the preglazed windows being installed were manufactured by employees who were receiving substandard wages. The agent further stated at the time that he was ". . . going to contact his attorney to see if there was any way he could advertise this fact to the public." On May 12, 1966, the Respondent sent a letter to various unions which were members of the Building Trades Council of Kansas City stating that the Respondent intended to picket the construction site but requesting the other unions to advise their members who were employed at that site not to refuse to cross the picket line or work. The record does not establish that these other unions ever advised their respective members to such effect. Four days later, a picket appeared at the jobsite after the employees were on the job with the following sign:

NOTICE TO THE PUBLIC

FOR INFORMATIONAL PURPOSES ONLY

The Windows Being Installed on This Project

Are Glazed By Cupples Product [sic] Corp.

Whose Employees

Are Receiving Sub-Standard Wages & Conditions

Being Paid By the Glazing Industry In This Area

---------- Please Do Not Buy ----------

Cupples Products Corp. Glazed Windows

Help Us Maintain Our Wages & Working

Conditions In This Area

Glaziers And

Glassworkers LU NO. 558

The picketing continued without incident until May 20. On that day the picket appeared before the employees had commenced their work, and Sharp's and Royse's

engineers and oilers walked off the job.[1/] Since neither of these employers could continue their operations without those employees, they sent their remaining employees home. Respondent's business agent was immediately informed that employees were refusing to work because of the picket line, and he ordered picketing to cease. The agent then went to the jobsite and informed departing employees that he didn't want anyone to cease working because of the picketing. The agent also sent a telegram to the Union that represented the striking employees reiterating his request that it instruct its members that they should not refuse to work.

Respondent resumed picketing on May 27. Although Respondent's business agent again went to the site to persuade the engineers and oilers to remain, another work stoppage ensued. This same sequence of events occurred on June 1 and 2, when the picketing was finally halted permanently.[2/]

The General Counsel contends that the picketing of this construction site violated Section 8(b)(4)(i) and (ii)(B) of the Act. The Respondent asserts, on the other hand, that it was engaged in lawful appeals to consumers. We agree with the General Counsel, for the stipulated facts clearly establish that the Respondent unlawfully intended to cause a work stoppage by its picketing.

The dispute before us is but one of a series that began late in 1963 when the employees of Cupples voted against representation by a Glaziers' union.

1/ We find that the first work stoppage occurred on May 20, when picketing commenced for the first time before employees began to work. This conclusion is based on the mutually supporting testimony of one of the employees who refused to work, the Respondent's business agent, Sharp Bros., Royse, and another subcontractor on the jobsite. Thus, Royse's oiler stated that he first refused to work on the date the picket showed up before they went to work, but the following day there was no picket so he worked. Respondent's representative McGee stated he had no knowledge of a work stoppage until he received a phone call from the picket on May 20, as a result of which he went to the jobsite, and this testimony is supported by the foreman for Evans Electrical Construction Company, a subcontractor for Sharp Bros., who indicated that the first time he recalled a work stoppage, McGee appeared at the jobsite shortly afterwards. The job superintendent for Sharp Bros. and the foreman for Royse agreed that a picket appeared at about 8:30 a.m. on May 20 and that their engineers and oilers refused to cross the picket line.

2/ During this period the Respondent also picketed B. D. & R. The signs used were similar to those at the construction site. This picketing is not alleged to be unlawful.

Thereafter, on at least one occasion in 1964, a Glaziers' union picketed construction sites where Cupples' preglazed windows were being installed because Cupples' employees were nonunion. The Board found that the Glaziers' union had unlawfully induced employees to refuse to work in order to force their employers to cease doing business with Cupples, rejecting the contention that the Union was engaged in permissible publicity picketing.[3/] In 1965 this Glaziers' union picketed another construction site with signs requesting the public not to buy Cupples' products. And on that occasion, as in the instant case, the union requested that the local building trades unions order their members to continue working despite a picket line. The Board nonetheless found on the facts that the Respondent's object was to induce the employees on the jobsite to cease working in order to force their employer to refrain from using Cupples' products.[4/]

It is clear from the record in the instant case that the Respondent herein was picketing for the same purpose as did its sister local in the earlier cases, i.e., appealing to neutral employees with an object of causing them to refuse to continue working. It is significant that Respondent's picketing on the first 4 days, which began after the neutral employees had reported for work on those days, did not result in any employees walking off the job; but that on May 20 the Respondent changed its hours of picketing to commence before the employees reported for work. Under the circumstances, we can only conclude that when the initial picketing did not cause a refusal to work, Respondent changed its times of picketing so that neutral employees would have to cross the picket line in order to enter the jobsite. While Respondent's business agent, having been informed on May 20 of the refusal to cross the picket line, did order picketing to cease on that day and ostensibly requested the employees to return to work, he nevertheless resumed the picketing on May 27.

3/ Glaziers' Local Union No. 513, affiliated with Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO (Cupples Products Corporation), 148 NLRB 1648.

4/ Glaziers' Local Union No. 513, affiliated with Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO (Cupples Products Corporation), 158 NLRB No. 145.

In view of the above, we can only conclude that at all times the Respondent actually intended to induce the neutral employees to engage in work stoppages, and that it caused such stoppages, in violation of Section 8(b)(4)(i)(B) of the Act.

The Respondent's protestation that it was engaged in informational picketing directed solely at the public, cannot be reconciled with this intended inducement of employees to engage in a work stoppage. In such a case ". . . the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer."[5/]

Therefore, in these circumstances, and in consideration of the fact that the Respondent's dispute was avowedly concerned with the working conditions at the Cupples plant, we conclude that an object of the picketing was to induce and encourage employees at the jobsite to refuse to work in order to apply pressure against the neutral persons for the purpose of forcing Sharp Bros. to cease doing business with B. D. & R. and to compel B. D. & R. to cease dealing with Cupples Products in violation of Section 8(b)(4)(i)(B) of the Act.[6/] And, since ". . . a work stoppage against a neutral employer constitutes restraint and coercion of such employer within the meaning of clause (ii) of Section 8(b)(4)(B) of the Act,"[7/] we further find that the Respondent also violated that Section of the Act.

IV. The Effect of the Unfair Labor Practices on Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

5/ N.L.R.B. v. Fruit and Vegetable Packers, Local 760, 377 U.S. 50, 57.

6/ Since we have found that the Respondent intended to cause a work stoppage, we need not, and do not, pass upon the Respondent's contention that it could lawfully appeal to neutral employers not to use Cupples' products in the future. But cf., Salem Building Trades Council (Cascade Employers Association), 163 NLRB No. 9.

7/ Local 370, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (Baughan Plumbing), 157 NLRB No. 2. See also, International Brotherhood of Electrical Workers, Local 313, AFL-CIO, et al. (James Julian, Inc.), 147 NLRB 137.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. Cupples Products Corporation, Sharp Bros. Contracting Co., B. D. & R. Engineering Company, Royse Masonry Co., Inc., and Builders Association of Kansas City, are persons engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Glaziers' Local Union No. 558, affiliated with Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By inducing or encouraging individuals employed by persons engaged in commerce or in an industry affecting commerce to engage in a strike or refusal to perform services, and by coercing or restraining persons engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring Royse to cease doing business with Sharp Bros., to force or require Sharp Bros. to cease using, handling or otherwise dealing in the products of Cupples and to cease doing business with B. D. & R., and to force or require B. D. & R. to cease doing business with Cupples, Respondent has violated Section 8(b)(4)(i) and (ii)(B) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Glaziers' Local Union No. 558, affiliated with Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, Kansas City, Missouri, its officers, agents, and representatives, shall:

1. Cease and desist from engaging in, or inducing or encouraging individuals employed by Sharp Bros. Contracting Co. and Royse Masonry, or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle work on any goods, articles, materials, or commodities, or to perform any services; and from threatening, coercing, or restraining the above-named employers or any other person engaged in commerce or in an industry affecting commerce; when in either case an object thereof is to force or require Sharp Bros., B. D. & R. or any other person to cease doing business with Cupples Products Corporation.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post in Respondent's business offices and meeting halls in Kansas City, Missouri, copies of the attached notice marked "Appendix."[8/] Copies of said notice, to be furnished by the Regional Director for Region 17, shall, after being duly signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for Region 17 for posting by each of the employers named in the preceding paragraphs, if willing, at all places where notices to their respective employees are customarily posted.

8/ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

(c) Notify the Regional Director for Region 17, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. JUN 6 1967

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO ALL MEMBERS OF GLAZIERS' LOCAL UNION NO. 558 AFFILIATED WITH BROTHERHOOD OF PAINTERS, DECORATORS, AND PAPERHANGERS OF AMERICA, AFL-CIO, AND ALL EMPLOYEES OF SHARP BROS. CONTRACTING CO., ROYSE MASONRY CO., INC., B. D. & R. ENGINEERING COMPANY, AND CUPPLES PRODUCTS CORPORATION

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT engage in a strike, or induce or encourage individuals employed by SHARP BROS. CONTRACTING CO. and ROYSE MASONRY, or any other person engaged in commerce, or in industry affecting commerce, to engage in a strike, or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, materials, articles, or commodities, or to perform any services, nor will we threaten, coerce, and restrain the above-named Employers, or any other person, where an object thereof is to force or require Sharp Bros., B. D. & R., or any other person, to cease doing business with CUPPLES PRODUCTS CORPORATION.

GLAZIERS' LOCAL NO. 558, AFFILIATED WITH BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board Regional Office, 610 Federal Building, 601 E. 12th Street, Kansas City, Missouri, Telephone No. Fr 4-7000, if they have any question concerning this notice or compliance with its provisions.

BRIEF FOR PETITIONER IN NO. 21,781 AND RESPONDENT IN NO. 21,883

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,781

GLAZIERS' LOCAL No. 558, a/w Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 21,883

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GLAZIERS' LOCAL No. 558, a/w Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, *Respondent*

On Cross-Petitions for Review and Enforcement of a Decision and Order of the National Labor Relations Board

---

DAVID S. BARR
WILLIAM B. PEER
1825 K Street, N. W.
Washington, D. C. 20006

LEWIS F. GRAYSON
6333 Tholozan Street
St. Louis, Missouri

Attorneys for Petitioner in No. 21,781 and Respondent in No. 21,883.

BARR & PEER
1825 K Street, N. W.
Washington, D. C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF CASES

* Cases chiefly relied upon.

* Cases chiefly relied upon.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,781

GLAZIERS' LOCAL No. 558, a/w Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 21,883

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GLAZIERS' LOCAL No. 558, a/w Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, *Respondent*

On Cross-Petitions for Review and Enforcement of a Decision and Order of the National Labor Relations Board

---

BRIEF FOR PETITIONER IN NO. 21,781 AND RESPONDENT IN NO. 21,883

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the National Labor Relations Board properly found that the Union induced and encouraged individuals employed by persons engaged in commerce or in an industry affecting commerce to engage in a strike or refusal to perform services, and coerced or restrained persons engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring Royse

Masonry Co. to cease doing business with Sharp Bros., forcing or requiring Sharp Bros. to cease using, handling or otherwise dealing in Cupples' products and to cease doing business with B.D. & R. Engineering Corp., and forcing or requiring B.D. & R. to cease doing business with Cupples, in violation of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act.

This case has not been previously before this court.

STATEMENT OF THE CASE

1. The Facts

In No. 21,781, the case is before the Court on a petition to review and set aside a final order of the National Labor Relations Board, and the Court has jurisdiction under Section 10(f) of the National Labor Relations Act, as amended, Act of June 23, 1947, c.120, 61 Stat. 136, 29 U.S.C. § 151, et seq. In No. 21,883, the Board has cross-petitioned for enforcement of its order, and the Court has jurisdiction under Section 10(e) of the Act. The cases were consolidated by Order of the Court. The Board's Decision and Order is reported in 165 NLRB No. 27.

The case involves picketing at the site of construction of an office building in Kansas City, Missouri, within the territorial jurisdiction of Glaziers' Local No. 558, Brotherhood of Painters, Decorators, and Paperhangers of America, AFL-CIO (hereafter called "Union").

The general contractor on the job was Sharp Bros. Contracting Co. (hereafter called "Sharp"), and the masonry sub-contractor was Royse Masonry Co., Inc. (hereafter called "Royse"). The windows installed on this job were preglazed[1] by Cupples Products Corporation (hereafter

[1] "Preglazed" normally means that the glass has been fitted into the frame at a shop or plant, and the window comes to the job-site as a finished product ready for installation. When not "preglazed," the window is assembled on the job-site.

called "Cupples"), with whom the Union had a dispute. Sharp had purchased the preglazed windows from B. D. & R. Engineering Corporation (hereafter called "B. D. & R."), a wholesale distributor of building materials for a number of manufacturers including Cupples. The windows were delivered to the job site on or about March 29, 1966. (Stip., J.E. 2 and 3; Stip., p. 2, par. 3).[2]

In mid-April, 1966, Ralph McGee, Business Representative of the Union, visited the job site and learned from the superintendent that the windows to be installed had been preglazed by Cupples. McGee informed the superintendent that he had heard Cupples was paying substandard wages and that he (McGee) was going to contact his attorney to see if he could advertise this fact to the public. (Stip., p. 3, par. 4). On April 26, 1966, McGee sent a receipted letter to Cupples, as follows:

> "Cupples Product Corp.
> 2650 So. Hanley Rd.
> St. Louis, Missouri
>
> Gentlemen:
>
> It has come to our attention that your pre-glazed windows are being distributed by B-D-R Engineering Corp., 1933 No. 10th, Kansas City, Kansas.
>
> It is our further understanding that your employees glazing such windows are receiving wages and conditions substantially less than that now being paid in the industry.
>
> If the above is not true please furnish us such information that will prove you are paying the prevailing wage and conditions by May 2, 1966 or we will assume such is not the case and will consider picketing in an informational basis all establishments using your product and any distributor of your product in the Kansas City area.

---

2 Reference to the parties' stipulation shall read "Stip., p. —, par. —." Exhibits attached to the stipulation will be referred to as "Stip., J.E. —" (for Joint Exhibits), "Stip., G.C. Exh. —" (for General Counsel's Exhibits), and "Stip., R. Exh. —" (for Respondent's Exhibits). The Board's Decision and Order will be cited as "D. and O., p. —."

This is not an attempt to organize your employees or obtain a collective bargaining agreement with your Company.

GLAZIERS LOCAL UNION No. 558

RALPH G. McGEE,
Bus. Rep.

cc: B-D-R Engineering Corp."

(Stip., p. 3, par. 4; Stip., R. Exh. 1).

This letter was never answered.

On May 12, 1966, McGee mailed the following letter to various business agents of local unions affiliated with the Building Trades Council in Kansas City:

"Dear Sir and Brother:

It is the intention of our Local Union No. 558 to place an informational picket at the construction site of Sharp Brothers located at 6640 Troost, Kansas City, Missouri.

The purpose of the picketing is to inform the public that the windows being installed at the above project have been glazed by employees of the Cupples Product Corporation receiving sub-standard wages and conditions substantially less than is now being paid in this area.

Our purpose in such informational picketing is to inform the public and is not to require or encourage any of your members or any individual or company to refuse to cross said picket line. Therefore, we request you advise your members who are or may be employed at this construction site not to refuse to cross such line or refuse to offer their service to their respective employers by reason of such picketing.

Fraternally yours,

GLAZIERS & GLASSWORKERS
LOCAL UNION No. 558

RALPH G. McGEE,
Bus. Rep."

(Stip., p. 3, par. 4; Stip., R. Exh. 2).

Also on May 12, McGee addressed a meeting of the Building Trades Council in Kansas City, wherein he informed business agents of the various crafts that his Union would picket the job site, that the picket sign would mean just what it said, and that the Union did not want anyone to leave the job. On the same day, McGee visited the job site in the company of four other business agents, representing other craft unions, and repeated the foregoing message directly to employees working on the job. McGee expressly told the employees that he wanted them to stay on the job regardless of the picketing. (Stip., p. 3, par. 4; p. 7, par. 13).

The picketing commenced on May 16, 1966. On that day, and throughout the period hereafter described, the picketing was conducted by one individual carrying a sign which stated:

"NOTICE TO THE PUBLIC

For Informational Purposes Only

The Windows Being Installed On This Project
Are Glazed By Cupples Product Corp.
Whose Employees
Are Receiving Sub-Standard Wages & Conditions
Being Paid By The Glazing Industry In This Area

——— Please Do Not Buy ———

Cupples Products Corp. Glazed Windows.

Help Us Maintain Our Wages & Working
Conditions In This Area.

Glazers and
Glass Workers LU No. 558"

(Stip., p. 3, par. 4; Stip., G.C. Exh. 1).

The picket passed out handbills to employees on the job and to others, which read as follows:

> "The picketing being conducted here is to advertise to the buying public that Cupples Products Corporation windows are glazed by employees receiving sub-standard wages and conditions that are being paid in this area.
>
> Therefore we urge all employees employed on this project or making deliveries on this project to cross the picket line and perform all services as required by their employers.
>
> Under no circumstances are we attempting to force or require any company to cease doing business with Cupples Products Corporation, but our sole and only object is to request that the buying public do not buy Cupples factory glazed windows.
>
> GLAZIERS AND GLASSWORKERS
> LOCAL UNION No. 558
>
> 4941 Prospect Kansas City, Missouri
>
> Use This Handbill On Job"

(Stip., p. 4, par. 6; Stip., G.C. Exh. 2).

The picketing continued without a work stoppage or other incident until 2:30 p.m. on May 19, when several employees walked off the job, and the job was shut down by Sharp. (Stip., p. 4, par. 5; p. 5, par. 6 and 7). McGee was not informed of this incident. On the following morning, May 20, the picket was again present and when Sharp's engineer and oiler refused to work, Sharp sent the other employees home. The picket telephoned McGee and told him that "some of the people on the job wouldn't work." McGee instructed the picket to take the sign down, put it in his car, and wait for McGee. McGee was at the site in ten minutes. He told the employees the picket was there only to advertise and he didn't want anyone to leave. (Stip., p. 4, par. 5; p. 5, par. 8 and 9). On returning to his office, McGee dispatched two telegrams, one to Hoisting

Engineers Local 101 and one to Sharp. To Local 101, McGee stated: "Have removed picket from job at 67th and Troost." The telegram to Sharp stated: "Have removed picket from job at 67th and Troost—doing everything I can to get men back to work." (Stip., p. 5, par. 9; Stip., R. Exhs. 3 and 4). McGee kept the picket off, and the job continued without incident, until May 27. On that day, when the picketing resumed in the morning, Sharp's engineer and Royse's engineer and oiler ceased working. Royse placed a call to McGee, who asked Royse to hold his employees on the job and told Royse he'd be there in ten minutes. When McGee arrived, he handed out his leaflets and told the men there was no reason to quit work. Royse's engineer walked off the job anyway. (Stip., p. 4, par. 5; p. 6, par. 12). The picket next appeared at 2:00 p.m., May 31, at which time Sharp's engineer left the job, and the same occurred on June 1, and 2. (Stip., p. 4, par. 5; p. 7, par. 14). After the June 2 incident, the picket was pulled off, and the picketing was not resumed thereafter.[3] (Stip., p. 8, par. 18).

2. Proceedings Below

On these facts, Builders' Association of Kansas City filed charges against the Union, and the General Counsel of the NLRB issued a complaint dated August 30, 1966, alleging that the Union had violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act. On September 9, 1966, the Union filed its answer to the complaint. The complaint was amended on September 13, 1966, and served on the parties. On September 29, 1966, the parties entered into a stipulation of facts; waived a hearing before a Trial Examiner; agreed that the charge, complaint, and stipulation shall constitute the entire record in the case; and agreed to submit the stipulated record directly to the

---

[3] During the period May 16 to June 2, 1966, the Union also picketed B. D. & R. at its Kansas City, Kansas location, utilizing similar signs and handbills. The legality of this activity was not challenged. (Stip., p. 8, par. 16).

Board for findings of fact, conclusions of law, and a Decision and Order. The Board approved the stipulation and transferred the case to itself, by order dated October 5, 1966. On June 6, 1967, the Board issued its Decision and Order, concluding that the Union had engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended. This appeal followed on cross petitions for review and enforcement of the Board's Decision and Order.

STATUTE INVOLVED

The statutory provision involved is Section 8(b)(4) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 et seq.:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

SUMMARY OF ARGUMENT

I.

Both the Board's conclusion that the picketing violated Section 8(b)(4)(i)(B) and its conclusion that 8(b)(4)(ii)(B) had been violated were based on precisely the same fact finding, to wit, that the Union had induced or encouraged a work stoppage. Specifically, the Board found that "the first work stoppage occurred on May 20, when picketing commenced for the first time before the employees began to work." (D. and O., p. 4, fn. 1) From this, the Board said, it could "only conclude" that "on May 20 the Respondent changed its hours of picketing to commence before the employees reported for work . . . so that neutral employees would have to cross the picket line in order to enter the jobsite." (D. and O., p. 5). Therefore, according to the Board, the Union induced or encouraged a work stoppage in violation of Section 8(b)(4)(i)(B).

But the Board's fact findings find no support in the record. To begin with, the first work stoppage occurred not on the morning of May 20, but at 2:30 p.m. on May 19, 1966. This was the stipulated and uncontradicted testimony of Don Sharp, President of the general contractor, Donnell James, job superintendent for Sharp, and Mike Royse, foreman for Royse. (Stip., p. 4, par. 5; p. 5, par. 6 and 7). Also, the fact was conceded by the General Counsel in his brief to the Board.

Moreover, the record does not sustain the finding that the picketing on May 20 began before employees reported for work; or that if it did so begin, it was the first time. The fact is that the record does not show the starting time of work.

Finally, there is no support for the proposition that the Union sought to force employees to "cross the picket line," thereby inducing a work stoppage. For work stoppages

occurred at 2:30 p.m. on May 19 and 2:00 p.m. on May 31, and on neither occasion were the employees put to the choice of working or *crossing* a picket line.

Plainly, then, the Board's fact findings were erroneous. It is equally clear that this record would not and does not support a conclusion that Section 8(b)(4)(i)(B) had been contravened. As the Board has recognized, "picketing at the secondary employer's premises alone is not *per se* 'inducement or encouragement' within the meaning of Clause (i). Whether picketing constitutes 'inducement or encouragement' . . . is an issue to be resolved in the light of all the evidence in a particular case." *Minneapolis House Furnishing Co.*, 132 NLRB 40, 48 LRRM 1301, 1304, *enf. den. on other grounds*, 331 F. 2d 561, 56 LRRM 2164 (8th Cir. 1964). Nor is it sufficient to show that a work stoppage had in fact occurred; it must be factually shown that respondent-union induced or encouraged it. *Building and Construction Trades Council of Tampa (Tampa Sand & Material Co.)*, 132 NLRB 1564, 48 LRRM 1548 (1961). In the instant case, "there is no evidence that the present petitioners even tried or wished to cause a stoppage." *Carpenters* v. *NLRB (Endicott Church Furniture Inc.)*, 286 F. 2d 533, 535, 47 LRRM 2254, 2256 (D.C. Cir. 1960). Indeed, the record shows that the Union did all it could to prevent a stoppage. Thus, on May 12, prior to the picketing, the Union agent had sent letters to the various Building Trades locals, had addressed a meeting of the Building Trades locals, had addressed a meeting of the Building Trades Council, and had visited employees at the job site, all for the purpose of informing unions and employees alike that they were not to interpret the forthcoming picketing as a signal to stop work. (Stip., p. 3, par. 4). The picket signs and handbills were equally clear on this point (Stip., G.C. Exhs. 1 and 2). On each of the few instances when a work stoppage occurred, the Union's agent promptly and forcefully took positive steps to arrest it. On each such occasion, the Union called off the picket-

ing for a cooling-off period, and terminated the picketing completely on June 2. (Stip., p. 4, par. 5; p. 5, par. 9; p. 6, par. 12; p. 7, par. 14; p. 8, par. 18; R. Exhs. 3 and 4). The sole inference to be drawn in these circumstances is that the sporadic work stoppage undertaken by a few individuals were occasional despite, and not because of, the Union's activities and efforts.

II.

Since the Board's finding of a violation of Section 8(b)(4)(ii)(B) was based entirely on its erroneous conclusion that the Union had induced or encouraged a work stoppage within the meaning of Clause (i), the former conclusion falls with the latter.

In point of fact, the Union's activity in this case amounted to the very type of consumer picketing upheld by the Supreme Court in *NLRB* v. *Fruit Packers (Tree Fruits Labor Relations Committee)*, 377 U.S. 58, 55 LRRM 2961, as against the contention that such picketing ran afoul of 8(b)(4)(ii)(B). In that case, the respondent had a dispute with a producer of apples, and picketed the retail stores selling that brand of apples with the object of persuading consumers not to buy that product. The Court held that since picketing directed solely at the "product" of a primary employer was not one of the "specific ends" outlawed by the Act, such picketing was lawful. It explained: "When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute." 377 U.S. at 72.

Here, too, the Union followed, and directed its activity solely at, a particular product (glazed windows) of the primary employer (Cupples). There could be no mistaking the limited object of the picketing. The picket sign limited its appeal to "please do not buy Cupples Products Corp. glazed windows;" while the handbills stated: "Under no

circumstances are we attempting to force or require any company to cease doing business with Cupples Products Corporation, but our sole and only object is to request that the buying public do not buy Cupples factory glazed windows." (Stip., G.C. Exhs. 1 and 2).

In these circumstances the Union's conduct may not be held to have constituted "restraint or coercion" for a secondary object, within the meaning of Section 8(b)(4)(ii)(B).

ARGUMENT

I. The Board's Ultimate Conclusion Was Based on Its Finding That the Union Induced or Encouraged a Work Stoppage, and That Finding Is Not Supported by the Evidence.

The Board's ultimate conclusion that the Union was in violation of Sections 8(b)(4)(i)(ii)(B) was arrived at by means of a simple syllogism: First, based on its fact findings, the Board concluded that the Union induced or encouraged a work stoppage within the meaning of clause (i) of the Section; second, and without additional factual aid, it found that the object of such inducement or encouragement was to compel certain neutrals to cease doing business with B. D. & R. and Cupples, thus satisfying clause (B) of the Section; third, again without further fact findings, it held that clause (ii) of the Section had been violated since "'a work stoppage against a neutral employer constitutes restraint and coercion of such employer . . . .'" Therefore, it concluded, the Union had violated Section 8(b)(4)(i)(ii)(B) of the Act.

Since the Board's conclusion, in its entirety, was bottomed solely on its fact findings as to the Union's inducement of a work stoppage, those findings merit close examination. In pertinent part, they were presented as follows:

> "The picketing continued without incident until May 20. On that day the picket appeared before the em-

ployees had commenced their work, and Sharp's and Royse's engineers and oilers walked off the job.[1]

[1] We find that the first work stoppage occurred on May 20, when picketing commenced for the first time before employees began to work. This conclusion is based on the mutually supporting testimony of one of the employees who refused to work, the Respondent's Business Agent, Sharp Bros., Royse, and another subcontractor on the jobsite. Thus, Royse's oiler stated that he first refused to work on the date the picket showed up before they went to work, but the following day there was no picket so he worked. Respondent's representative McGee stated he had no knowledge of a work stoppage until he received a phone call from the picket on May 20, as a result of which he went to the jobsite, and this testimony is supported by the foreman for Evans Electrical Construction Company, a subcontractor for Sharp Bros., who indicated that the first time he recalled a work stoppage, McGee appeared at the jobsite shortly afterwards. The job superintendent for Sharp Bros. and the foreman for Royse agreed that a picket appeared at about 8:30 a.m. on May 20 and that their engineers and oilers refused to cross the picket line." (D. and O., pp. 3-4).

* * * * *

"It is significant that Respondent's picketing on the first 4 days, which began after the neutral employees had reported for work on those days, did not result in any employees walking off the job; but that on May 20 the Respondent changed its hours of picketing to commence before the employees reported for work. Under the circumstances, we can only conclude that when the initial picketing did not cause a refusal to work, Respondent changed its times of picketing so that neutral employees would have to cross the picket line in order to enter the jobsite. While Respondent's business agent, having been informed on May 20 of the refusal to cross the picket line, did order picketing to cease on that day and *ostensibly* requested the employees to return to work, he nevertheless resumed the picketing on May 27.

"In view of the above, we can only conclude that at all times the Respondent actually intended to induce the neutral employees to engage in work stoppages, and that it caused such stoppages, in violation of Section 8(b)(4)(i)(B) of the Act." (D. and O., pp. 5-6.) (Emphasis supplied.)[4]

[4] The Board's peculiar use of the word "ostensibly" in this context must simply reflect the Board's free exercise of poetic license, for its use is certainly not justified by the record.

From the foregoing, "we can only conclude" that the Board was inattentive to the record. The Board's basic fact finding, crucial to its decision, was that "the first work stoppage occurred on May 20, when picketing commenced for the first time before employees began to work." (D. and O., p. 4, fn. 1). The record shows, to the contrary, that the first stoppage occurred at 2:30 p.m. on May 19, 1966.

Thus, Don Sharp, President of Sharp Bros., the General Contractor on the job, testified by stipulation that "the picketing continued without incident until 2:30 p.m. on May 19, 1966, when Sharp's engineer, oiler, and two iron workers walked off the job." (Stip., p. 4, par. 5). Donnell James, Job Superintendent for Sharp, stated that "the first work stoppage occurred about 2:30 p.m., May 19, 1966, when his engineer and two iron workers left the job." (Stip., p. 5, par. 6). Mike Royse, foreman for Royse, testified that "during the afternoon of May 19, 1966, after the picket appeared on the job, his engineer and oiler ceased working and left the job site." (Stip., p. 5, par. 7). None of this testimony is mentioned in the Board's Decision. The General Counsel of the NLRB did not even suggest, let alone argue, that the first stoppage occurred on May 20. Instead, in his brief to the Board, the General Counsel conceded: "The Stipulation describes the following work stoppages. On May 19, 1966, at 2:30 p.m., Sharp's engineer, oiler, and two iron workers walked off the job. This caused Sharp to send the rest of his employees home."

The Board's contrary finding is said to be based "on the mutually supporting testimony" of several individuals. (D. and O., p. 4, fn. 1). "Royse's oiler" (Platz) merely stated that he personally walked off for the first time when the picket appeared before work began on some unidentified date. He did *not* testify as to work stoppages by other employees; moreover, he did not deny that a work stoppage occurred on May 19. McGee, as the Board states, had no

personal knowledge of the May 19 work stoppage; but, that cannot constitute evidence that no such stoppage had in fact occurred. The "foreman for Evans Electrical" (Schoonover) did testify that "the first time he recalled a work stoppage (date unknown), McGee shortly afterwards appeared on the job site." (Stip., p. 7, par. 13). Here again, however, the testimony records the personal experience of the witness, with reference to the electricians, not to the employees of Sharp or Royse. Disingenuously, the Board relies also on the fact that "the job superintendent for Sharp Bros. and the foreman for Royse agreed that a picket appeared at about 8:30 a.m. on May 20 . . . ." (D. & O., p. 4, fn. 1), in support of a finding that the *first* stoppage occurred on that date. Not mentioned was the fact that both of these witnesses testified that the first stoppage occurred on the 19th.

Accordingly, the stipulated testimony that the first work stoppage occurred at 2:30 p.m. on May 19 stands virtually uncontradicted.[5]

Moreover, the record does not support the finding that on May 20 "picketing commenced for the first time before employees began to work." (D. & O., p. 4, fn. 1). True the picketing on that day commenced at 8:30 a.m. But the record is silent on the scheduled starting time, either generally or with respect to any given day. Royse's oiler (Platz) testified that "the picket usually showed up after the employees went to work," but that on the day he decided not to work the picket was there before work started. (Stip., p. 6, par. 10). This hardly supports a conclusion either that on May 20 the picket showed up before work, or that this was the first such occasion. Further, with reference to the May 27, picketing, which also com-

---

[5] Even if, for the sake of argument, one were to make the incredible assumption that the "testimony" relied on by the Board made the issue ambiguous, the ambiguity could be resolved only by credibility findings. No such findings were made by the Board; and none could be made, for the record was stipulated without hearing or trial.

menced at 8:30 a.m. (Stip., p. 4, par. 5), Royse testified that "his engineer and oiler *were at work* but, when the picket appeared, they *ceased working.*" (Stip., p. 6-7, par. 12) (emphasis added). This would indicate that the work starting-time preceded 8:30 a.m., at least on May 27.

On the present record, it is difficult to appreciate the Board's conclusion that "Respondent changed its times of picketing so that neutral employees would have to cross the picket line in order to enter the jobsite." (D. & O., p. 5). For individual employees on the job showed no particular preference for working *behind* a picket line over having to *cross* one. As already noted, the first work stoppage occurred at 2:30 p.m. on May 19. (Stip., p. 4, par. 5; p. 5, par. 6 and 7). Another occurred at 2:00 p.m. on May 31 (Stip., p. 4, par. 5). On neither occasion were the employees put to the choice of working or *crossing* a picket line.

With these fallen fact-findings, falls the Board's conclusion that the Union violated Section 8(b)(4)(i)(B) of the Act. For, as the Board itself has recognized, "picketing at the secondary employer's premises alone is not *per se* 'inducement or encouragement' within the meaning of Clause (i). Whether picketing constitutes 'inducement or encouragement' of employees of secondary employers to engage in work stoppages or refusals to perform services is an issue to be resolved in the light of all the evidence in a particular case." *Minneapolis House Furnishing Co.*, 132 NLRB 40, 48 LRRM 1301, 1304, *enf. den. on other grounds*, 331 F. 2d 561, 56 LRRM 2164 (8th Cir. 1964). See also, *University Cleaners*, 151 NLRB 341, 58 LRRM 1406, *enf'd.*, 359 F. 2d 289, 61 LRRM 2709 (1st Cir. 1966); *BSEIU (Industrial Janitorial Services Inc.)*, 151 NLRB 1424, 58 LRRM 1614, *enf'd.*, 367 F. 2d 227, 63 LRRM 2307 (10th Cir. 1966). And "there is no evidence that the present petitioners even tried or wished to cause a stoppage." *Carpenters* v. *NLRB (Endicott Church Furniture Inc.)*, 286 F. 2d 533, 535, 47 LRRM 2254, 2256 (D.C. Cir.

1960). To the contrary, the record shows that the Union did all that it could to prevent it. Thus, on May 12, prior to the picketing, the Union agent had sent letters to the various Building Trades locals, had addressed a meeting of the Building Trades Council, and had visited employees at the job site, all for the purpose of informing unions and employees alike that the forthcoming picketing was informational only and must not cause or create a work stoppage. (Stip., p. 3, par. 4). Both the picket signs and the handbills were clearly explicit on this point. (Stip., G.C. Exhs. 1 and 2). Work was not interrupted from May 16, 1966 to May 19. When McGee first learned of a work stoppage, on May 20, he immediately instructed the picket to "take the sign down," and he went to the job-site to advise employees that he "didn't want anyone to leave." With equal promptness, McGee dispatched telegrams to the Union whose members had walked off and to the General Contractor, informing both that the picket had been removed and advising the latter that McGee was "doing everything I can to get men back to work." (Stip., p. 5, par. 9; Stip., R. Exhs. 3 and 4). The picketing was not resumed until May 27, when another stoppage occurred. On that occasion, McGee asked Royse to keep his men on the job and promptly went to the job-site to hand out the leaflets and ask the men to stay on the job. (Stip., p. 6, par. 12). The picketing did not resume until May 31. On that day, and again on June 1 and 2, sporadic work stoppages occurred and McGee responded promptly and forcefully each time in opposition to the work interruptions. (Stip., p. 4, par. 5; p. 7, par. 14). The picketing did not resume after June 2. (Stip., p. 8, par. 18).

The Board's finding that this conduct amounted to "inducement or encouragement" of a work stoppage plainly contradicts the facts. See *Local 399, Service & Maintenance Employees (Wm. J. Burns Detective Agency)*, 136 NLRB 431, 49 LRRM 1793 (1962); *Wholesale Employees Local 261* v. *NLRB*, 282 F. 2d 824, 108 U.S. App. D.C. 341 (1960).

It is not sufficient support for a finding of a violation of the Act to show that a work stoppage simply had occurred. It must be factually shown that respondent-union induced or encouraged it. *Retail Store Union (Rachman Bag Co.)*, 49 LRRM 1673; *Building and Construction Trades Council of Tampa (Tampa Sand & Material Co.)*, 132 NLRB 1564, 48 LRRM 1548 (1961). In *Tampa Sand*, for example, the Board held that respondent-union had not induced or encouraged the work stoppage because the facts were as susceptible to an inference that the stoppage was occasioned by common action on the part of employees as to an inference that it was induced by union leadership. With respect to a walk-off by a union steward, the Board stated: "To hold that a steward may not walk off the job because of his own unwillingness to handle non-union products without fixing a responsibility for an unfair labor practice upon his union is to foreclose the steward, simply by reason of his office, from all individual freedom of action." (48 LRRM at 1550). There was a similar decision in *IBEW (James Julian, Inc.)*, 147 NLRB 137, 56 LRRM 1164 (1964), where the union's business agent simply told the members that "it is strictly up to each individual what he wants to do." 147 NLRB at 143.

By way of comparison, the record here shows that the Union acted affirmatively and decisively to keep employees on the job. The sole inference to be drawn in these circumstances is that the sporadic work stoppages undertaken by a few individuals were occasioned despite, and not because of, the Union's activities and efforts.[6]

---

[6] The Board's obvious grasping at factual straws in this case may be due to a gastronomical reaction that this Union "was picketing for the same purpose as did its sister local" in two previous cases involving the same Company. (D. and O., pp. 4-5). But, those cases and this one do not have in common the same facts or parties. The *Cupples* cases cited by the Board involved picketing by another union, albeit a "sister" union, in 1964 and 1965, respectively. In the first *Cupples* case (148 NLRB 1648, 57 LRRM 1210), the respondent gave advance notice to other unions of the intended picketing, but said nothing about employees remaining on the job. The Board found

Manifestly, the Board's finding that the Union induced and encouraged a work stoppage is supported neither by facts nor law. And since that finding, as we have shown, forms the base of the Board's carelessly constructed syllogistic pyramid, its ultimate conclusion that the Union contravened Section 8(b)(4)(i) and (ii) (B) is similarly unsound. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474.

II. As a Matter of Law, the Union's Consumer Picketing Was Not Prohibited By Section 8(b)(4)(ii)(B)

Without supportive facts, the Board's conclusions that the Union threatened, coerced, or restrained neutral employers for an unlawful objective fare no better than its finding that the Union had induced or encouraged a work stoppage.

The picket signs and handbills (Stip., G.C. Exhs. 1 and 2) utilized by the Union showed that its purpose was to ask the public not to buy windows glazed by Cupples because its employees were working for sub-standard wages and conditions. Accordingly, the Union's effort amounted to the very type of consumer picketing ruled permissible by the Supreme Court in *NLRB* v. *Fruit Packers (Tree Fruits Labor Relations Committee)*, 377 U.S. 58, 55 LRRM

---

a violation, stating: "the stipulation shows no action taken by Respondent after the picketing began to forestall employee refusals to cross the picket line or to urge those who refused to work to return to their jobs . . . the picket sign failed even to mention the name of the manufacturer who, it said, maintained substandard wages and conditions of employment." (57 LRRM at 1211). In the second *Cupples* case (158 NLRB 162, 62 LRRM 1232), the respondent did ask other unions to instruct their members to keep working, but took no other such action once a work stoppage had begun. The Board found a violation, again citing, *inter alia*, the respondent's failure to take prompt action to induce striking employees to return to work. In this case, of course, the facts are quite the opposite, the Union having taken strong, prompt, and continuous action to assure that job operations would proceed without interruptions. With respect to its fact findings in this case, therefore, any comfort the Board may have derived from the earlier cases seems clearly misplaced.

2961 (1964), as against the contention that a *per se* violation of 8(b)(4)(ii)(B) had occurred. In that case, the Court emphasized that Congress did not intend to prohibit picketing *per se* or all picketing directed at consumers at a secondary site. Since picketing directed solely at the "product" of a primary employer was not one of the "specific ends" outlawed by the Act, such picketing was upheld. The Court observed:

> "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. 'In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience his established flow from such picketing.' Labor Board v. Drivers Local Union, 362 U.S. 274, 284. We have recognized this Congressional practice and have not ascribed to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history', ibid., that Congress intended to do so as regards the particular ends of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concen that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.
>
> "We have examined the legislative history of the amendments to § 8(b)(4), and conclude that it does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing when it is limited, as here, to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway stores. All that the legislative history shows in the way of an 'isolated evil' believed to require proscription of peaceful consumer picketing at secondary sites, was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference

between such conduct, and peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods."

* * * * *

"When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute." 377 U.S. at 62-63, 72.

Here, too, the Union followed and directed its activity solely at a particular product (glazed windows) of the primary employer (Cupples). It is readily observable that windows glazed for construction are not ordinarily bought and sold at "retail stores," as in the case of *Tree Fruits*. Hence, the product must be addressed where it is "used," namely at the site of construction. For it is here that contractors, suppliers, architects, engineers and others who would buy or specify the use of the product daily may be found and appealed to.[7] There could be no mistaking the single object involved, since it was expressly isolated by the picket sign and handbill. The former limited its plea to "please do not buy Cupples Products Corp. glazed windows;" the latter stated: "Under no circumstances are we attempting to force or require any company to cease doing business with Cupples Products Corporation, but our sole and only object is to request that the buying public do not buy Cupples factory glazed windows." (Stip., G.C. Exhs. 1 and 2).

Moreover, the mere fact that a work stoppage occurred cannot support a finding of illegality under clause (ii)(B). The Board has held, for example, that picketing a con-

---

[7] The fact that "neutral employers" may be among the consumer class whom the Union sought to persuade not to buy Cupples' windows can be of no legal consequence. *NLRB* v. *Servette, Inc.*, 377 U.S. 46, 55 LRRM 2957 (1964); *Carolina Lumber*, 130 NLRB 1438, 47 LRRM 1502 (1961).

struction site to inform the public that a primary employer was not observing union wages was not for an unlawful object, despite the fact that employees refused to cross the picket line and that employees of said primary employer were not working at the site for four days during the period of the picketing. The Board said: "As there is no other evidence that the picketing was actually aimed at achieving unlawful secondary objectives over and beyond those incidental effects normally flowing from legitimate primary picketing, we cannot find that picketing was unlawful." *IBEW (Brownfield Electric, Inc.)*, 145 NLRB 1163, 1166, 55 LRRM 1113, 1114 (1964). Similarly, in *NLRB* v. *Local 825, Operating Engineers (Nichols Electric Co.)*, 326 F. 2d 218, 220, 55 LRRM 2116, 2117 (3rd Cir. 1964), a work stoppage was referred to as "merely an incidental consequence" of the Union's lawful "efforts." *Cf., Retail Clerks Union* v. *NLRB (Food Employers Council, Inc.)*, 296 F. 2d 368, 111 U.S. App. D.C. 246 (1961); *Painters Union (J. M. Miller Decorating Co.)*, 156 NLRB 317, 61 LRRM 1042 (1966).

CONCLUSION

For the foregoing reasons, we submit that the Decision and Order of the Board should be reversed.

Respectfully submitted,

DAVID S. BARR
WILLIAM B. PEER
1825 K Street, N. W.
Washington, D. C. 20006

LEWIS F. GRAYSON
6333 Tholozan Street
St. Louis, Missouri

Attorneys for Petitioner in No. 21,781 and Respondent in No. 21,883.

Of Counsel:

BARR & PEER
1825 K Street, N. W.
Washington, D. C. 20006

No. 21,781
No. 21,883

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

GLAZIERS' LOCAL NO. 558, a/w BROTHERHOOD OF PAINTERS, DECORATORS and PAPERHANGERS OF AMERICA, AFL–CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

GLAZIERS' LOCAL NO. 558, a/w BROTHERHOOD OF PAINTERS, DECORATORS and PAPERHANGERS OF AMERICA, AFL–CIO *Respondent.*

On Petition to Review and on Cross-Petition
to Enforce an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET–PREVOST,
Assistant General Counsel,

GLEN M. BENDIXSEN,
CLARICE FELDMAN,
Attorneys,

National Labor Relations Board

THE CASILLAS PRESS, INC. – 1717 K Street, N. W. – Washington, D. C. 20006

INDEX

AUTHORITIES CITED

Cases:

Page

Page

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,781

GLAZIERS' LOCAL NO. 558, a/w BROTHERHOOD OF PAINTERS, DECORATORS and PAPERHANGERS OF AMERICA, AFL–CIO *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 21,883

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

GLAZIERS' LOCAL NO. 558, a/w BROTHERHOOD OF PAINTERS, DECORATORS and PAPERHANGERS OF AMERICA, AFL–CIO *Respondent.*

On Petition to Review and on Cross-Petition to Enforce an Order of the National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF ISSUE PRESENTED

The issue presented, as stipulated by the parties in the pre-hearing conference stipulation, and set forth at pp. 1-2 of the Union's brief, is:

Whether the Board properly found that the Union induced and encouraged individuals employed by persons engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal to

perform services, and coerced or restrained persons engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring Royse to cease doing business with Sharp Bros., forcing or requiring Sharp Bros. to cease using, handling or otherwise dealing in Cupples' products and to cease doing business with B.D.&R., and forcing or requiring B.D.&R. to cease doing business with Cupples, in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

In accordance with Rule 8(d) of the General Rules of this Court the Board states that this case is before the Court for the first time on the merits.

COUNTERSTATEMENT OF THE CASE

No. 21,781 is before the Court upon the petition of Glaziers' Local No. 558, a/w Brotherhood of Painters, Decorators and Paperhangers of America, AFL–CIO (the "Union"), to review and set aside an Order of the National Labor Relations Board issued against the petitioner on June 6, 1967, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) No. 21,883 is before the Court on the Board's petition to enforce this same order. The Board answered the Union's petition to review, and, on May 27, 1968, this Court granted the Board's motion to consolidate these cases and to treat the Board's petition as a cross-petition for enforcement. The Board's Decision and Order are reported at 165 NLRB No. 27. This Court has jurisdiction over the proceeding under Sections 10(e) and (f) of the Act.

I. THE BOARD'S FINDINGS OF FACT

Cupples Products Corp. ("Cupples") located in St. Louis, Missouri, manufactures preglazed windows and doors which are then sold to persons engaged in the building and construction industry (D&O 2).[1] In the Kansas City, Missouri area Cupples' sales agent is B.D.&R. Engineering Corp. ("B.D.&R."), a wholesale distributor of building supplies (*ibid.*). Among B.D.&R.'s customers during the pertinent period was Sharp Brothers Contracting Company ("Sharp"), a general contractor who had been engaged to construct an office building in Kansas City (*ibid.*). Sharp, in turn, engaged Royse Masonry Co., Inc. ("Royse") to do the masonry work at the construction site (*ibid.*). Both Sharp and Royse are members of the Builders' Association of Kansas City, an association of employers, individuals, firms, and corporations engaged in the building industry, which bargains on behalf of its members with various labor organizations (*ibid.*).

About March 29, 1966, pursuant to a contract with B.D.&R., Sharp received at the jobsite a shipment of preglazed windows manufactured by Cupples (Stip. pp. 2-3, para. 3). Shortly afterward, in the middle of April, Ralph McGee, the Union's business agent, visited the jobsite and talked to the job superintendent, Donnell James (D.&O. 3; Stip. p. 3, para. 4). James told Union Agent McGee that the windows came from Cupples already glazed (Stip. p. 3, para. 4). McGee responded that he had heard that Cupples was paying substandard wages to its employees and that he was

---

[1] Since the case was decided by the Board upon the stipulation of the parties, the record consists of that stipulation, the exhibits attached thereto, and the Board's Decision and Order. References designated "Stip." are to the stipulation; those designated "GCE" refer to the General Counsel's Exhibits. "RE" refers to respondent's exhibits and "D. & O." to the Board's Decision and Order. Page references follow the pagination of the original record materials. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

". . . going to contact [the Union's] attorney to see if there was any way he could advertise this fact to the public" (D. & O. 3; Stip. p. 3, para. 4).

On April 26, 1966, Agent McGee sent a letter to Cupples in which he stated that the Union knew that Cupples' pre-glazed windows were being distributed by B.D.&R. in Kansas City, and that it was the Union's understanding that Cupples' employees were receiving substandard wages and working conditions (Stip. p. 3, para. 4, RE 1). By May 2, 1966, the letter continued, Cupples was to furnish the Union with proof that its employees were receiving "the prevailing wages and conditions." And unless Cupples did so, the Union would assume its information was correct and would "consider picketing in [sic] an informational basis all establishments using [Cupples'] product and any distributor of [Cupples'] product in the Kansas City area" (*ibid.*). The Union received no response to this letter (Stip. p. 3, para. 4).

Subsequently, on May 12, 1966, the Union sent a letter to business agents of the various unions which belonged to the Building Trades Council of Kansas City (D. & O. 3; Stip. p. 3, para. 4, RE 2). In this letter the Union stated that it intended to picket the Sharp jobsite and requested that the other unions advise their members employed at that jobsite that they were not to refuse to cross the Union's picket line or to work (*ibid.*). That same day, McGee addressed a meeting of the Building Trades Council and repeated the same message to the member business agents; and, accompanied by four business agent members of the Trades Council, McGee visited the jobsite and informed several employees that the job would be picketed on May 16 for publicity purposes only, that he wanted the men to stay on the job (Stip. p. 3, para. 4). There is no record evidence that any Trades Council union complied with Agent McGee's request to notify its members to continue to work at the Sharp construction site despite the Union's picketing (D. & O. 3; See Stip. p. 6, para. 10).

On May 16, after the men employed at the Sharp jobsite had reported for work, Agent McGee appeared at the construction site carrying a placard which read:

NOTICE TO THE PUBLIC
FOR INFORMATIONAL PURPOSES ONLY
The Windows Being Installed on This Project
Are Glazed by Cupples Product [sic] Corp.
Whose Employees
Are Receiving Sub-Standard Wages & Conditions
Being Paid By the Glazing Industry In This Area
---- Please Do Not Buy ----
Cupples Products Corp. Glazed Windows
Help Us Maintain Our Wages & Working
Conditions In This Area
Glaziers And
Glassworkers LU No. 558

At the same time, McGee distributed handbills which explained that the "picketing being conducted here is to advertise to the buying public that Cupples . . . windows are glazed by employees receiving sub-standard wages and conditions . . . ", that the Union wanted "all employees employed on this project or making deliveries on this project to cross the picket line and perform all services as required by their employers", and that the Union was not "attempting to force or require any company to cease doing business with Cupples . . . , but [its] sole and only object is to request that the buying public do not buy Cupples factory glazed windows" (D. & O. 3; Stip. p. 3, para. 4, p. 4, para. 6, p. 6, para. 10, GCE 1 & 2).[2]

[2]The picketing, as the Union has stipulated, was directed not only to the general public, but to the contractors on the jobsite, suppliers, architects, engineers, employees and any and all persons having business at the jobsite (Stip. p. 8, para. 20).

No one left the job that day (D.&O. 3; Stip. p. 3, para. 4, p. 4, p. 6 para. 10). The picketing continued without incident until Friday, May 20 when, for the first time, the picket appeared before the employees had begun their work, and Sharp and Royse's engineers and oilers walked off the jobsite (D.&O. 3-4, n. 1).[3] Since neither employer could continue his operations without these employees, they sent their remaining employees home (D.&O. 4; Stip. p. 4, para. 5, p. 5, para. 8, p. 6, para. 10). Immediately thereafter, the picket telephoned Union Agent McGee and told him that "some of the people on the job wouldn't work" (D.&O. 4; Stip. p. 5, para. 9). McGee instructed the picket to take the banner down and put it in the car (Stip. p. 5, para. 9). Shortly afterward, McGee arrived at the jobsite and told the departing employees that he did not want anyone to stop working because of the picketing, that the Union was picketing for publicity reasons only (D.&O. 4; Stip. p. 5, para. 9, p. 7, para. 13). McGee then returned to his office and sent a telegram to the union which represented the striking employees, notifying them that he had removed the picket from the job (RE 3, Stip. p. 5, para. 9). McGee also sent a telegram to Sharp saying "Have removed picket from job . . . Doing everything I can to get men back to work" (RE 4, Stip. p. 5, para. 9). The following day when the men returned to the jobsite, the picket was absent, and the men worked (D.&O. 4; Stip. p. 6, para. 10, p. 6, para. 12, p. 5, para. 9).

---

[3]The stipulation contains several versions of the initial work stoppage. The Board evaluated them and determined that "the first work stoppage occurred on May 20 when picketing commenced for the first time before employees began to work." (D. & O. 3-4, n. 1). The Union in its Statement of Facts (Br. 6-7) relies on versions of the incident which were not adopted by the Board. And it now asserts, for the first time, that the Board erred in evaluating the stipulated record, and that the Board's findings as to the date, timing, and cause of the first work stoppage are unsupported by the record (U. Br. pp. 9-11, 12-19). As we shall demonstrate, these assertions were waived before the Board and, therefore, cannot be asserted here; and, at any rate, the Board's evidentiary findings are supported by the record. A complete discussion of these contentions appears, *infra*, pp. 11-18.

One week later, on about May 27, the Union resumed picketing (D.&O. 4; Stip. p. 4, para. 5, p. 5, para. 9, p. 6, para. 12). Once again, the engineers and oilers refused to work (D.&O. 4; Stip. p. 4, para. 5, p. 6 paras. 10, 12). As before, the Union's business agent, McGee, went to the construction site and attempted to persuade the striking employees to work, but the men refused to do so, and work at the site was stopped (D.&O. 4; Stip. p. 6-7, para. 12). The same sequence of events was repeated on June 1 and 2, after which time the picketing was permanently halted (D.&O. 4; Stip. p. 4, para. 5, p. 7, para. 14).[4]

At no time have any of Cupples' employees been on the jobsite, nor are Cupples products sold to the public from this jobsite (Stip. p. 7, para. 15).

As a result of an unfair labor charge filed by the Builders' Association of Kansas City, the Board's Regional Director for the Seventeenth Region issued the instant complaint against the Union. On September 29th, the General Counsel, Union, and charging party moved to transfer the proceedings to the Board and entered into a stipulation of the testimony of all the witnesses pertinent to the dispute (D.&O. 1). These parties also waived a hearing before a trial examiner and agreed that the pleadings and stipulation should constitute the entire record in the case and that "no oral testimony is necessary or desired by any of the parties" (*ibid.*). On October 5, 1966, the Board approved the stipulation and transferred the case to itself (*ibid.*). The parties were allowed by stipulation to file briefs with the Board; the Union did not do so (Stip. p. 2). Subsequently, the Board issued its Decision and Order. The Union did not move for reconsideration or rehearing.

---

[4] During the same period of time the Union also picketed B.D.&R. (D. & O. 4, n. 2; Stip. p. 8, para. 16). This picketing was not alleged to be unlawful (*ibid.*).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the Union's picketing violated Section 8(b)(4)(i) and (ii)(B) of the Act. In the Board's view, the picketing was an appeal intended to induce and encourage employees of secondary employers to refuse to work in order to force the neutral employers to cease dealing with the primary employer, Cupples (D.&O. 6). Accordingly, the Union did more than merely "follow the struck product; it create[d] a separate dispute with the secondary employer" and thereby exceeded its right to engage in a limited consumer boycott recognized by the Supreme Court in *N.L.R.B. v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 U. S. 58, 72, (1964).

To remedy these unfair labor practices, the Board ordered the Union to cease and desist from the unlawful conduct found and to post the appropriate notices (D.&O. 7-9).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE UNION PICKETED THE JOBSITE OF BUILDING CONTRACTORS WHO PURCHASED WINDOWS MANUFACTURED BY CUPPLES TO ENCOURAGE EMPLOYEE WORK STOPPAGES AND TO BRING PRESSURE ON NEUTRAL EMPLOYERS, IN VIOLATION OF SECTION 8(b)(4)(i) AND (ii)(B) OF THE ACT

A. The Issue defined

Section 8(b)(4) of the Act, as amended in 1959, in relevant part provides that a union or its agents may not "induce or encourage" employee work stoppages ((i)(B)) or "threaten, coerce or restrain" employers ((ii)(B)),

with an object of effecting a secondary boycott (see Un. Br. 8). Both of these prohibitions, as the Supreme Court has recently reiterated, were designed to prohibit "pressure tactically directed toward a neutral employer in a labor dispute not his own." *National Woodwork Manufacturers Association, et al. v. N.L.R.B.*, 386 U. S. 612, 623 (1967).

The stipulated facts establish that the Union and its sister local have had a continuing labor dispute with Cupples and charged that employer with paying below union wage standards; that in furtherance of this dispute the Union picketed a jobsite where contractors Royse and Sharp Bros. were constructing an office building; that during the course of the picketing employees of Royse and Sharp Bros. engaged in work stoppages; and that these employers, whose sole connection with the labor dispute was the fact that they had purchased windows from Cupples, were neutral employers in the Union's primary dispute with Cupples. At first view, therefore, this case presents a classic situation cognizable under Section 8(b)(4)(B), since Royse and Sharp Bros. had a right to be free of economic pressure designed to involve them in a dispute between the Union and Cupples. In light of Royse's and Sharp Bros.' obvious neutrality here, a finding of unlawful picketing would plainly satisfy the "central legislative purpose . . . to confine labor conflicts to the employer in whose labor relations the conflict had arisen, and to wall off the pressures generated by that conflict from unallied employers" *National Maritime Union of America v. N.L.R.B.*, 120 U. S. App. D. C. 299, 305, 346 F.2d 411, 417 (1965), cert. denied, 382 U. S. 840.

But not all picketing at a neutral employer's premises is violative of Section 8(b)(4). The location of the picketing, although indicative of a union purpose to bring forbidden pressures to bear against the neutral, is not always conclusive. Thus, for example, peaceful picketing at a retailer's

store has been defended on the grounds that its sole object is to follow an "unfair" product to its outlet, i.e., to publicize the existence of a labor dispute with the manufacturer of the product and discourage retail consumption of the offending product without creating a separate strike or boycott against the neutral retailer. In *N.L.R.B. v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 U. S. 58 (1964), the Supreme Court agreed that such a defense would have merit, but emphasized that the picketing must be "directed only at the struck product" (377 U. S. at 63).

The Union contends here that the *Tree Fruits* defense must be deemed applicable to the facts of this case. The Union argues that its picketing was directed solely at "consumers," namely, "contractors, and suppliers, architects, engineers, employees, and any and all other persons having business at the job site" (Stip. p. 8, para. 20) who "would buy or specify the use of [Cupples' windows] daily" (Un. Br. 21). Thus, the Union concludes, as in *Tree Fruits* the "sole and only object [was] to request that the buying public do not buy" the product of the primary employer (*ibid.*).

In *Tree Fruits*, however, the Board at the initial stage of the proceedings held that the union picketed a Safeway food store for the sole object of persuading customers not to purchase apples obtained from disfavored fruit packers. No work stoppages had taken place, and the Board held that the picketing was "'not intended to induce or encourage employees of Safeway or of its suppliers to engage in any kind of action.'" Accordingly, the Board dismissed the complaint's allegation that the picketing violated clause (i) of Section 8(b)(4)(B) (377 U. S. at 61 n. 5). The sole issue before the Supreme Court, therefore, was whether the Board properly held that such consumer picketing constituted coercion and restraint violative of clause (ii). In the instant case, however, employees of the picketed neutral employers did

engage in work stoppages, and the Board found that, in violation of clause (i), the Union's picketing was "actually intended" to achieve this result to pressure the neutrals to cease dealing with Cupples (D.&O. 6). As the Board further concluded, work stoppages obtained by such secondary picketing also "constitutes restraint and coercion of [a neutral] employer within the meaning of clause (ii) . . ." (*ibid.*). See *N.L.R.B. v. Highway Truckdrivers & Helpers, Local 107,* 300 F.2d 317, 319-320 (C.A. 3, 1962); *Local 370, Union Association of Journeymen, etc. (Baughan Plumbing),* 157 NLRB 20, 21 n. 3 (1966); *IBEW, Local 313 (James Julian, Inc.),* 147 NLRB 137, 142 (1964), enforced *per curiam,* 351 F.2d 954 (C.A. 3, 1965).[5] We show below that the Board's finding of secondary object is supported in the record.

B. The Board's finding that an object of the Union's picketing was to induce and to encourage neutral employees to engage in the work stoppages

1. The finding that the work stoppages began after the Union changed its hours of picketing to coincide with the employees' arrival at work

As shown (*supra,* p. 6 n.3) the Board found that after 4 days of picketing the first work stoppage occurred on the morning of May 20, 1966, and that the Union had on that morning changed the commencement of its picketing to coincide with the employees' arrival at work (D.&O. 5-6). The Union now claims, for the first time, that these underlying factual findings are unsupported by the record (Un. Br. 9-11, 12-19). We submit that this claim was waived before the Board, and, therefore, may not be asserted here.

[5]Cases cited by the Union (Br. 21-22) merely show that work stoppages incidentally resulting from *primary* picketing may not constitute economic pressure proscribed by clause (ii).

Section 10(e) of the Act reads, in relevant part, as follows:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

This is a common provision in federal regulatory statutes and embodies the general rule that "simple fairness to those who are engaged in the task of administration and to litigants requires * * * that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *U. S. v. L. A. Tucker Truck Lines,* 344 U. S. 33, 37 n. 7 (1952).

Consequently, as the Supreme Court has noted (*U. S. v. L. A. Tucker, supra,* 344 U. S. at 36-37):

> We have recognized in more than a few decisions and Congress has recognized in more than a few Statutes[1] that orderly procedure and good administration requires that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.

---

[1] Section 9(a) of the Securities Act of 1933, 15 U.S.C. §77; §25(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78y; §24 of the Public Utility Holding Company Act, 15 U.S.C. §79x; §10 of the Fair Labor Standards Act, 29 U.S.C. §210; §10(e) of the National Labor Relations Act, 29 U.S.C. §160(e).

That Section 10(e) refers to factual defenses, as well as procedural defenses is clear:

> By this provision, Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested. * * * Congress desired that all controversies

> of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, by the Board.

N.L.R.B. v. Cheney Lumber Co., 327 U. S. 385, 389 (1946). Accord, *Marshall Field & Co. v. N.L.R.B.*, 318 U. S. 253, 256 (1943); *Gearhart & Otis, Inc. v. S.E.C.*, 121 U. S. App. D. C. 186, 188-189, 348 F.2d 798, 801 (1965); *Democrat Printing Co. v. F.C.C.*, 91 U. S. App. D. C. 72, 78, 202 F.2d 298, 302 n. 10, 303, 304 (1952).

In the present case, the parties waived a hearing before a Trial Examiner and entered into a stipulation of the facts. They also agreed that the stipulation "shall constitute the entire record in the case," that "no oral testimony is necessary or desired by any of the parties." They further moved to transfer the case directly to the Board for determination, pursuant to 29 C.F.R. §102.50 of the Board's Rules and Regulations, Series 8, as amended. This motion was granted.

Without the benefit of a brief from the Union, the Board evaluated the stipulation and issued its Decision, in which it made the factual findings of which the Union now complains. The Board's Rules and Regulations permit a party to a Board proceeding to bring to the Board's attention any material error in a motion for "reconsideration, rehearing, or reopening of the record."[6] Nothing in the stipulation barred the Union from filing such a motion[7] and arguing that the Board's interpretation of the underlying facts was contrary to the parties' stipulation or that those factual findings were made on an inadequate record. The failure to do so gave the Board no opportunity to consider this argument, and bars it at this stage of the proceedings.

---

[6] 29 C.F.R. §102.49(d), Series 8, as amended.

[7] Indeed, the parties agreed that "This stipulation is made without prejudice to any objection that any party may have as to the materiality or competency of any facts stated" (Stip. p. 8, para. 19).

We anticipate that the Union will argue that the Board's Rules provide that "a motion for reconsideration or rehearing need not be filed to exhaust administrative remedies."[8] This has its source, however, in §10(c) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. §1009(c), which provides that agency action otherwise final is final for purposes of judicial review whether or not reconsideration is sought. And as this Court held in a case involving a provision in the Security Exchange Act virtually identical to Section 10(e) of the Act.[9]

> [T]his language of Section 10(c) is preceded by: 'Except as otherwise required by statute.' Thus 25(a) of the Exchange Act prohibiting court consideration of objections to a Commission order unless first 'urged before the Commission' would apply to an objection arising after agency decision since such objection may be the subject of an application for rehearing pursuant to the Commission's rules.

Gearhart and Otis, Inc. v. S.E.C., 121 U. S. App. D. C. 186, 189, 348 F.2d 798, 801 (1965), rehearing denied, June 10, 1965, citing, with approval, 3 Davis, Administrative Law, § 20.06 (West, 1958) and Attorney General's Manual on The Administrative Procedure Act 104 (1947). See also, 3 Davis at § 20.08. See, to the same effect, *U. S. v. L. A. Tucker Truck Lines, supra,* 344 U. S. at 37, n. 7.

In *Gearhart and Otis,* the objection to participation in the decision by an agency member who was not on the agency at earlier stages of the proceeding, was held barred from court review since, after issuance of the decision revealed his participation, "no [such objection] was made by way of a petition for rehearing . . ." (121 U. S. App. D. C. at 188, 348 F.2d at 800).

---

[8] 29 C.F.R. §102.48(d).

[9] Sec. 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78y.

Failure to give timely opportunity for agency consideration likewise bars the Union's attack on the Board's fact-finding process here. For if, as the Union seems to assert (Br. 15 n. 5), the Board's factual findings could only be entered after a hearing and resolution of conflicting testimony, then this "case gives emphasis to the salutary policy adopted by 10(e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field v. N.L.R.B., supra,* 318 U. S. at 256. Thus, if a timely motion for reconsideration or reopening of the record had been filed making these contentions, the Board could have not only re-examined its factual findings but could also have considered whether a hearing was necessary, or whether the stipulated case should be disposed of on other grounds.

We submit, furthermore, that in any event the Board's evidentiary findings represent a fair and reasonable evaluation of the record and, consequently, should be sustained on review. *Universal Camera Corp. v. N.L.R.B.*, 340 U. S. 474, 490 (1951). The parties' stipulation consists for the most part of proffered testimony which, on the issue of the work stoppages, is partially in conflict. The Board evaluated the evidence presented and concluded (D.&O. 4, n. 1):

> We find this work stoppage occurred on May 20, when picketing commenced for the first time before employees began to work. This conclusion is based on the mutually supporting testimony of one of the employees who refused to work, the [Union's] business agent [McGee], Sharp Bros., Royse, and another subcontractor on the jobsite. Thus, Royse's oiler [Platz] stated that he first refused to work on the date the picket showed up before they went to work, but the following day there was no picket so he worked [Stip. p. 6, para. 10]. [The Union's] representative McGee stated he had no knowledge of a work stoppage

> until he received a phone call from the picket on May 20, as a result of which he went to the jobsite [Stip. p. 5, para. 9], and this testimony is supported by the foreman [Schoonover] for Evans Electrical Construction Company, a subcontractor for Sharp Bros. who indicated that the first time he recalled a work stoppage, McGee appeared at the jobsite shortly afterwards [Stip. p. 7, para. 13]. The job superintendent for Sharp Bros. and the foreman for Royse agreed that a picket appeared at about 8:30 a.m. on May 20 and that their engineers and oilers refused to cross the picket line [Stip. p. 5, para. 8].

The Union challenges this, asserting that the "stipulated testimony that the first work stoppage occurred at 2:30 p.m. on May 19 stands virtually uncontradicted." (Union Br. 14-15). This claim is based, in part, on an inaccurate summary of the testimony of Platz, McGee and Schoonover, upon which the Board principally relied.

Thus, the Union asserts (Br. p. 14):

> 'Royse's oiler' (Platz) merely stated that he personally walked off for the first time when the picket appeared before work began on some unidentified date. He did *not* testify as to work stoppages by other employees; moreover, he did not deny that a work stoppage occurred on May 19.

Read in context, however, Platz' testimony can be interpreted as the Board interpreted it – that the May 20 stoppage was the first of a series of work stoppages. Thus, in relevant part, the stipulation reads (p. 6, para. 10):

> Charles Platz, oiler for Royse, would testify that the first few days the picket was there everybody worked. The picket usually showed up after the employees went to work . . . Platz would also testify that the latter part of May (exact date unknown), the picket showed

> up before they went to work . . . Platz and Long [Royse's engineer] decided not to work until they heard from their Union. The next day, when they reported back, the picket was off, so they worked.

As shown, in identifying the date of the first work stoppage, the Board noted the significance of Platz' testimony that the jobsite was not picketed on the work day following the first work stoppage. Those who testified as to dates of the picketing agreed that after May 20, the Union withdrew its pickets from the site for several days ((Sharp) Stip. p. 4, para. 5, (Royse) Stip. p. 6, para. 11, (McGee) Stip. p. 5, para. 9).[10]

The Union also fails to undercut Shoonover's testimony that McGee appeared shortly after the first work stoppage (Stip. p. 7, para. 13) and McGee's testimony that he first appeared at the site in connection with a work stoppage on May 20 (Stip. p. 5, para. 9). Thus, it states that Business Agent McGee, "had no personal knowledge of the May 19 work stoppage," and, by so paraphrasing the stipulated testimony suggests that perhaps McGee had only been apprised by others of stoppages on that date. The stipulation does not require such an interpretation. It reads simply that "McGee would further testify that he had no knowledge of any work stoppage on May 19, 1966" (p. 5, para. 9).

Similarly, the Union states (Br. 15) that Schoonover's testimony recalling that the first work stoppage occurred on the 20th "records the personal experience of the witness, with reference to the electricians, not to the employees of Sharp or Royse." But the stipulation reveals that neither Schoonover "nor his seven electricians left the job during the picketing" (p. 7, para. 13). Consequently, it is clear that Schoonover was testifying as to the walkout

---

[10] To the extent that the Union suggests that Platz may not have participated in the first work stoppage, this is negated by the proffered testimony of Royse, whose version of the event the Union contends is accurate. Royse stated that his engineer (Long) and his oiler (Platz) participated in the first stoppage (Stip., p. 5, paras. 7-8).

by Sharp and Royses' employees, the only employees whom the Board found did participate in the stoppages.[11]

No reason appears in the record for giving controlling weight to the proffered testimony of James, Royse, and Sharp who placed the first work stoppage on May 19 (Un. Br. 14). Moreover, the stipulation records contradictions in their testimony. For example, Sharp testified as to 6 work stoppages;[12] James indicated there were 4;[13] and Royse said there were 3.[14] These contradictions reveal that, in recalling a series of events 4 months after those events have occurred, witnesses may well have been mistaken as to the specific dates on which those events took place. The Board evaluated this tangled testimony; its findings are based on a fair and reasonable reading of the stipulated record and should be upheld on review.

The Union's further claim (Br. 15), that the May 20 picketing began at 8:30 a.m. but that the record is silent as to the scheduled starting time for work, is disingenous. The proffered testimony of Platz, Sharp, James and Royse warrants the Board's finding that the picket appeared on May 20 "before the employees had commenced their work" (D.&O. 3, Stip. p. 5, para. 8, p. 4, para. 5, p. 5, par. 8).

---

[11] The fact that neither Platz nor Schoonover specifically denied that the first stoppage took place on the afternoon of May 19, is of no significance, for the record does not reveal whether these men were ever specifically questioned about this assertion. *Victor Products Corp. v. N.L.R.B.*, 93 U.S. App. D.C. 56, 60, 208 F.2d 834, 838 (1953).

[12] May 19, May 20, May 26, May 31, June 1, June 2 (Stip. p. 4, para. 5).

[13] May 19, May 20, June 1, June 2 (Stip. p. 5, paras. 6, 7, p. 7 para. 14).

[14] May 19, May 20, May 27 (Stip. p. 5, paras. 7 and 8, p. 6, para. 11, pp. 6-7, para. 12).

2. The finding that the picketing was intended to induce the work stoppages

The Union asserts that the work stoppages which clearly flowed from the picketing were wholly the individual acts of the employees for which the Union is not responsible. The Union relies on the statements in its handbills and communications with striking employees and officials of their building trades unions to the effect that they should cross the picket line and that the picketing was not intended to pressure employers to cease doing business with Cupples (*supra,* pp. 4-6). However, "[t]he words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." *I.B.E.W., etc. v. N.L.R.B.,* 341 U. S. 694, 701-702 (1951). *Brown Transport Corp. v. N.L.R.B.,* 334 F.2d 30, 38 (C.A. 5, 1964). And see *Local 349, I.B.E.W.,* 149 NLRB 430, 438 (1964), enforced 123 U. S. App. D. C. 119, 120, 357 F.2d 579, 580 (1965); *I.B.E.W., Local 313, supra,* 147 NLRB at 140-141. The Board, accordingly, must consider all the circumstances surrounding placement of a picket line. It may conclude that the objective openly disclaimed is in fact that which the Union sought to achieve. *N.L.R.B. v. Local 25, Int'l Brotherhood of Electrical Workers,* 383 F.2d 449, 453 (C.A. 2, 1967), and cases there cited. Accord: *National Maritime Union v. N.L.R.B.,* 120 U. S. App. D. C. 299, 301-302, 308, 346 F.2d 411, 413-414, 420 (1965), cert. denied, 382 U. S. 840; *United Steelworkers v. N.L.R.B.,* 111 U. S. App. D. C. 60, 63-64, 294 F.2d 256, 258-259 (1961); *Centralia Building and Construction Trades Council v. N.L.R.B.,* 124 U. S. App. D. C. 212, 214, 363 F.2d 699, 701 (1966). "A mere facade of 'consumer' picketing cannot foreclose the Board from determining the purpose of the Union's conduct. What in actuality is employee-oriented conduct, or veiled coercion of the secondary employer, cannot by the simple use of the words 'consumer directed,' be given statutory protection." *N.L.R.B. v. Millmen, etc., Local 550,* 367 F.2d 953, 955-956 (C.A. 9, 1966).

A finding of secondary objective, moreover, may rest solely on circumstantial evidence. As the Board has stated (*Local Union No. 272, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO*, 172 NLRB No. 19 (1968), 68 LRRM 1433, 1435):

> . . . [t]he absence of any direct evidence that any official or agent specifically directed the [employees] to engage in a work stoppage is not determinative. Circumstantial as well as direct evidence may be considered by the Board, as a realistic analysis of [the union's] conduct is all that is required. If, after such analysis the Board is persuaded of [the union's] illegal involvement, it is not foreclosed from finding a violation because of the absence of direct evidence. To contend here that the [employees] were acting independently in the exercise of their own free will and initiative rather than carrying out [the union's] policy . . . is to overlook the basic and fundamental realities of industrial life.

See also, *Amalgamated Meat Cutters, etc. Local 88 v. N.L.R.B.*, 99 U. S. App. D. C. 24, 29, 237 F.2d 20, 25 (1956), cert. denied, 352 U. S. 1015; *N.L.R.B. v. Local 294, Teamsters*, 284 F.2d 887, 893 (C.A. 2, 1960); *N.L.R.B. v. Laundry, Linen Supply, etc., Drivers, Local 928, et al.*, 262 F.2d 617, 619-620 (C.A. 9, 1958). Here, as the Board noted (D.&O. 4-5), it is not without significance that recent Board cases establish that the Union's sister local within the neighboring State of Missouri has resorted to unlawful secondary pressure against neutral employers who purchased preglazed windows from Cupples, following rejection of the local by Cupples' employees. In both cases, as in the instant case, the placards stated that the picketing was for "informational purposes only" and the building trades unions were given advance notice of the plan to establish an "information picket" at the jobsites. In the later case, trade union officials, as here, were asked to instruct their members to continue to work despite the picketing. In each

instance, the Board found that the object of the picketing was to encourage the work stoppages which resulted. See *Glaziers Local Union No. 513, etc. (Cupples Products Corporation),* 158 NLRB 1621, 1624-1625 (1966); *Glaziers Local Union No. 513, etc. (Cupples Products Corporation),* 148 NLRB 1648, 1650 (1964). In the instant case, the Union's actions support the inference that its picketing was calculated to produce the same result. Cf. *Local 349, I.B.E.W., AFL-CIO v. N.L.R.B.,* 123 U. S. App. D. C. 119, 120, 357 F.2d 579, 580 (1965).

As shown, after 4 days of picketing did not result in work stoppages, on May 20 the Union changed its hours of picketing to commence before the employees reported for work. Work stoppages then occurred. Business Agent McGee expressed his disapproval, and withdrew the picket line. As the Board noted, however, the inference that McGee was making genuine efforts to prevent such stoppages is negated by his resumption of the picketing a week later, precipitating another work stoppage. He permitted the picketing in identical form until June 2, although two additional work stoppages ensued (D.&O. 4, 5). The "normal purpose of a picket line is to persuade employees not to cross it." *N.L.R.B. v. Dallas General Drivers, etc., Local No. 745, AFL-CIO,* 264 F.2d 642, 648 (C.A. 5, 1959), cert. denied, 361 U. S. 814; *N.L.R.B. v. Associated Musicians, Local 802, AFL-CIO,* 226 F.2d 900, 904 (C.A. 2, 1955), cert. denied, 351 U. S. 962; *Brown Transport Corp. v. N.L.R.B., supra,* 334 F.2d at 36. We submit that McGee's manipulation of the picketing in the circumstances presented warrants the Board's conclusion that the Union sought to foster rather than cancel the invitation inherent in the picketing itself. Cf. *Teamsters Local 290 v. Oolite Concrete Co.,* 341 F.2d 210, 212 (C.A. 5, 1965), cert. denied, 382 U. S. 972; *Superior Derrick Corp. v. N.L.R.B.,* 273 F.2d 891, 897 (C.A. 5, 1960), cert. denied, 364 U. S. 816.

3. The finding that the *Tree Fruits* defense asserted was inapposite to the facts of this case

As shown, the Union's picketing was directed at the employees of neutral employers to disrupt their business relations with Cupples, the primary employer. It is, of course, sufficient to sustain the Board's finding of unlawful action if this secondary aim was "an object" of the picketing, even assuming other aims were also pursued. *N.L.R.B. v. Denver Bldg. & Constr. Trades Council*, 341 U. S. 675, 688-689 (1951). In such a case, the permissible *Tree Fruits* appeal to consumers not to purchase the "struck product" of the primary employer provides no defense to the picketing. As stated by the Ninth Circuit: "The principle enunciated in *Tree Fruits* permits a union to engage in picketing at the establishment of a secondary employer, so long as it is directed to his customers and not his employees, and is not an attempt to "restrain or coerce" the secondary employer to cease doing business with the primary employer." *N.L.R.B. v. Millmen, etc., Local 550, supra*, 367 F.2d at 955-956. Accord: *Honolulu Typographical Union No. 37, International Typographical Union v. N.L.R.B.*, (C.A.D.C., 1968), No. 21,367, 68 LRRM 3004, 3007; *N.L.R.B. v. Building Service Employees Int'l Union*, 367 F.2d 227, 229-230 (C.A. 10, 1966); *N.L.R.B. v. Salem Bldg. Trades Council*, 388 F.2d 987 (C.A. 9, 1968), cert. denied, __ U. S. __; *Bedding, Curtain and Drapery Workers Union, Local 140, etc. v. N.L.R.B.*, 390 F.2d 495, 500-503 (C.A. 2, 1968), cert. denied, __ U. S. __; *N.L.R.B. v. Local 254, Building Service Employees International Union, AFL-CIO*, 359 F.2d 289, 292 (C.A. 1, 1966), cert. denied, 389 U. S. 856.

Since the record here showed that the picketing was addressed, at least in part, to employees, the Board held "we need not, and do not pass upon the [Union's] contention that it could lawfully appeal to neutral employers not to use Cupples' products in the future" (D.&O. 6 n. 6). We note, however,

that the Union's formulation of its *Tree Fruits* argument at this stage of the proceedings omits basic factual distinctions. In *Tree Fruits* the neutral employer (Safeway) was a retailer who purchased for resale to the general public the product (apples) of the struck primary employer. The Supreme Court held that picketing which appealed only to the general public not to buy the struck product did not "create a separate dispute with the [neutral] employer," and was not a form of coercion of the neutral prohibited by clause (ii) of Section 8(b)(4) (377 U. S. at 72). Here, by contrast, the neutral employers purchased the primary's product (preglazed windows) not for resale, but for their own use, i.e., incorporation into the office building under construction. The Union is claiming a right to picket the jobsite occupied by the neutral employer on the ground that the neutral, and other such persons approaching the site, are "consumers" of the primary employer's product.[15] The Union asserts, in other words, that the carefully limited consumer picketing condoned in *Tree Fruits* authorizes picketing of a neutral employer if it may be said that the picketing constituted only an appeal that neutrals cease using one of the primary's products. As shown, however, the Union's picket line was directed at employees to encourage work stoppages, a classic form of secondary pressure condemned by Section 8(b)(4)(i) and (ii)(B) of the Act. Accordingly, the argument raised by the Union wholly lacks a factual premise. The Board, therefore, in an area regulated by an intricate statutory mechanism, properly refused to consider it. See *Honolulu Typographical*

---

[15] Specifically, the "consumers" here, according to the Union, are neutral employer Sharp Bros. (the general contractor who purchased the preglazed windows from B.D.&R. Engineering, a seller of the products of Cupples, the primary employer), neutral employer Royse (Sharp Bros.', subcontractor), and other persons in the building industry who may purchase Cupples' windows. Assertedly, the jobsite is the equivalent of the premises of the retailer (Safeway) in *Tree Fruits*, since Cupples does not ordinarily sell windows through retail outlets which could be picketed. (Un. Br. 21). B.D.&R., however, would appear more analogous to the retailer in *Tree Fruits*, as it distributes Cupples' windows. As shown, the Union picketed B.D.&R. and that picketing is not challenged here (*supra* p. 7 n. 4).

Union No. 37, etc. v. N.L.R.B., supra, sl. op., p. 6, n. 9, 68 LRRM at 3006 n. 9.[16]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue denying the petition to review and enforcing the Board's order in full.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
GLEN M. BENDIXSEN,
CLARICE FELDMAN,
Attorneys,
National Labor Relations Board.

August 1968.

---

[16] In *Honolulu Typographical,* this Court approved the Board's view that where the primary employer's product sold by the neutral employer has become an integral part of his total offering to the public (and therefore the consuming public could cease buying the primary's product only by not trading at all with the neutral), product picketing of the neutral is not lawful under *Tree Fruits.* For then the "picketing appeal to consumers is expanded to request a total boycott of the secondary seller [and] there exists a different type of pressure, one that spreads to and disrupts his entire trade" (sl. op., p. 6, 68 LRRM at 3006). In *Honolulu Typographical,* the Union's picketing of the neutral employers (restaurants) made the limited appeal to customers not to purchase the neutrals' products advertised by the primary employer (newspaper). The Court affirmed the Board's finding that the picketing constituted restraint and coercion against the neutrals, in violation of clause (ii), for since the primary employer advertised the neutrals' entire offering to the public, the customers were asked to engage in a total boycott of the neutrals. By contrast, in *Tree Fruits,* the customers were notified that "continued patronage of the neutral (Safeway) was permissible" and asked only to cease buying the struck product (apples) (sl. op., p. 8, 68 LRRM at 3007).

REPLY BRIEF FOR PETITIONER IN NO. 21,781 AND RESPONDENT IN NO. 21,883

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,781

GLAZIERS' LOCAL NO. 558, a/w BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 21,883

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GLAZIERS' LOCAL NO. 558, a/w BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO, *Respondent*

On Cross-Petitions for Review and Enforcement of a Decision and Order of the National Labor Relations Board

DAVID S. BARR
WILLIAM B. PEER
1825 K Street, N. W.
Washington, D. C. 20006

LEWIS F. GRAYSON
6333 Tholozan Street
St. Louis, Missouri

Attorneys for Petitioner in No. 21,781 and Respondent in No. 21,883.

Of Counsel:

BARR & PEER
1825 K Street, N. W.
Washington, D. C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

9

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,781

GLAZIERS' LOCAL NO. 558, a/w BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 21,883

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GLAZIERS' LOCAL NO. 558, a/w BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO, *Respondent*

On Cross-Petitions for Review and Enforcement of a Decision and Order of the National Labor Relations Board

---

REPLY BRIEF FOR PETITIONER IN NO. 21,781 AND RESPONDENT IN NO. 21,883

I. The Union Did Not Waive Its Argument That the Board's Fact Findings Were Erroneous by Not Filing a Motion for Reconsideration.

In our main brief, we presented this contention:

> "The Board's basic fact finding, crucial to its decision, was that 'the first work stoppage occurred on May 20, when picketing commenced for the first time before employees began to work.' (D. and O., p. 4, fn. 1). The record shows, to the contrary, that the first stoppage occurred at 2:30 p.m. on May 19, 1966." (Pet. br., p. 14).

The Board responds that our contention was waived before the Board by the operation of Section 10(e) of the Act and § 102.49(d) of the Board's Rules and Regulations (29 C.F.R. § 102.48(d) Series 8, as amended). The former

provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court . . . .;" the latter permits the filing of a motion for reconsideration with the Board, following decision. The Board reasons that we should have raised the above-quoted contention in a motion for reconsideration, and that our failure to do so forecloses the issue here.

There are two short answers. First, not only is the filing of such a motion unnecessary "to exhaust administrative remedies," as the Board recognizes, but it is deemed an "extraordinary postdecisional motion" (29 C.F.R. § 102.48 —heading) that may be filed only "because of extraordinary circumstances." (29 C.F.R. § 102.48(d)).[1] The Board's decision was not accompanied by or productive of "extraordinary circumstances" and the Board's brief does not suggest their existence. It requires no citation of countless authorities to show that there is surely nothing "extraordinary" about the Board making fact findings not supported by substantial evidence. Accordingly, the administrative remedy now insisted on by the Board was not reasonably available.

Second, our contention was squarely before the Board. In order to find, as it did, that the first work stoppage occurred on *May 20* the Board had to read, consider, and reject the *clear and uncontradicted* testimony of Sharp, James and Royse that the first work stoppage occurred on *May 19*, as well as the fact recitation of its own General Counsel who, in his brief to the Board, stated that the stipulation described a work stoppage that had occurred "[o]n May 19, 1966, at 2:30 p.m." (App. p. 6).[2] Our contention, which the Board now says is foreclosed, is simply a restatement of these facts. Therefore to suggest that it was not

---

[1] No such limitation was contained in the S.E.C. rule (17 C.F.R. § 201.21(e)) discussed by this Court in *Gearhart and Otis, Inc.* v. *S.E.C.*, 121 U.S. App. D.C. 186, 189, 348 F. 2d 798, 801 (1965), the case chiefly relied on by the Board (Bd. br., p. 13).

[2] A copy of the General Counsel's brief is attached hereto as an Appendix.

before the Board is simply absurd.[3] In effect, the "objection" urged was put to the Board by the Stipulation of the parties and rejected by the initial final order; therefore, "further urging of the objection through application for reconsideration ought to be unnecessary." 3 Davis § 20.08, p. 104, n. 21.

II. The General Counsel's Brief Fails To Sustain or Support the Board's Erroneous Findings That the Union Induced or Encouraged a Work Stoppage.

In an attempt to lend credence to the unsupportable findings of the Board, its General Counsel engages in a valiant but obviously strained semantic exercise. At the outset, his brief shuns an attempt to support the Board's affirmative reliance on the testimony of Platz, McGee and Schoonover, in favor of attacking *the Union's* treatment of their testimony. (Bd. br., p. 15-16). The argument then proceeds to the point that "[N]o reason appears in the record for giving controlling weight to the proffered testimony of James, Royse, and Sharp who placed the first work stoppage on May 19" (Bd. br., p. 16). Apparently it is not "reason" enough that their testimony was clear and uncontradicted with respect to the date of the first work stoppage, while the testimony of Platz, McGee and Schoonover was not even directly addressed to the point. Then, too, the General Counsel does not suggest a "reason" for *ignoring* the testimony of James, Royse, and Sharp, as the Board did. He simply attempts to discredit them (although the Board itself did not) by pointing to alleged "contradictions in their testimony." (Bd. br., p. 16). The sole "contradiction" referred to was not *within* the testimony of any of them, but allegedly existed between their versions of days on which work stoppages occurred, a largely irrelevant and insignificant fact. The General Counsel's finding of "con-

[3] In *Gearhart and Otis, supra*, note 1, and other cases cited by the Board the courts barred from the scope of review objections that might reasonably have escaped notice or consideration by the agency; not, as here, a contention that necessarily had to be faced by the agency on route to a decision.

tradictions" is spurious in any event; for it does not appear that James and Royse were asked to comment on whether or not a work stoppage occurred on each of the 6 days referred to by Sharp.

Having himself obfuscated the factual issue, the General Counsel branded the unambiguous testimony as "tangled" and asserted that, after all, the Board "evaluated" it and made "a fair and reasonable reading" of the record. (Bd. br., p. 17). As we have shown, however, the Board did not fairly read or evaluate the only relevant portion of the record. (Pet. br., pp. 12-16). The General Counsel's offer of a belated "evaluation" or rationale, which finds no counter-part in the decision of the Board itself, cannot serve to sustain the defective findings of the Board. "Courts do not rely upon theories in support of Board action advanced for the first time by Board counsel on appeal." *Amalgamated Clothing Workers* v. *NLRB*, 365 F. 2d 898, 904, n. 11, 124 U.S. App. D.C. 365, 371, n. 11 (1966); see also, *Burlington Truck Lines* v. *U. S.*, 371 U.S. 156, 168; *Metropolitan Life Ins. Co.* v. *Labor Board*, 380 U.S. 438, 444.

Respectfully submitted,

DAVID S. BARR
WILLIAM B. PEER
1825 K Street, N. W.
Washington, D. C. 20006

LEWIS F. GRAYSON
6333 Tholozan Street
St. Louis, Missouri

Attorneys for Petitioner in No. 21,781 and Respondent in No. 21,883.

Of Counsel:

BARR & PEER
1825 K Street, N. W.
Washington, D. C. 20006

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 17-CC-269

GLAZIERS LOCAL 558, affiliated with BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO (Sharp Bros. Contracting Co.)

and

BUILDERS' ASSOCIATION OF KANSAS CITY

GENERAL COUNSEL'S MEMORANDUM BRIEF TO THE BOARD

This case is before the Board upon General Counsel's complaint issued August 30, 1966, and Motion To Transfer Proceeding To The Board and Stipulation of Parties, said motion having been granted by the Board on October 5, 1966. The complaint alleges the Respondent has violated Sections 8(b)(4)(i)(ii)(B) of the Act.

ISSUES

The principal issue presented is whether the Respondent's picketing at the Rockhill Medical Building construction site is proscribed by the Act and thereby violated Section 8(b)(4)(i) and (ii)(B) of the Act.

ARGUMENT

The stipulated evidence clearly establishes that the picketing was prompted by the use of Cupples preglazed windows on the job site (see General Counsel's Exhibit No 1; Stip., page 3, paragraph 4).[1] While Respondent denies they have a dispute with Cupples, it is clear that McGee, Respondent's Business Representative, when informed

[1] All references to the Stipulation of Facts will be by the letters Stip., followed by the appropriate page and paragraph numbers.

Cupples windows were to be used, immediately stated that he had heard Cupples was paying substandard wages for shop glazed windows and he was going to contact his attorney to see if there was any way he could advertise this fact to the public (Stip., page 3, paragraph 4). It appears that Respondent's sole defense is that they are engaged in informational picketing. Yet, it was stipulated that at no time have any of Cupples employees been on the job site, nor are Cupples products sold to the public from this job site (Stip., page 7, paragraph 15). Thus, it is clear that the public could not have responded to the union appeal at the construction site as Cupples products are not distributed at that location but are incorporated with other materials in the construction of the building.

THE 8(b)(4)(i)(ii)(B) VIOLATION

The Stipulation describes the following work stoppages. On May 19, 1966, at 2:30 p.m., Sharp's engineer, oiler, and two iron workers walked off the job. This caused Sharp to send the rest of his employees home. On May 20, Sharp's engineer and oiler refused to work. On May 27, Sharp's engineer would not work. On May 31, when the picket appeared, Sharp's engineer shut down the crane and left the job. The same thing occurred on June 1 and 2, 1966 (Stip., page 4, paragraph 5). On these dates, Royse's engineer and oiler either left the job or refused to work when the picket appeared (Stip., page 5, paragraph 7; page 6, paragraph 10). Also, on May 20, 1966, two truckloads of precast concrete could not be unloaded and were returned to Omaha, Nebraska (Stip., page 6, paragraph 11).

The facts above clearly support a finding that Respondent, notwithstanding the language of the picket sign, not only induced and encouraged the employees of Sharp Bros., Royse, and others, to engage in a refusal to work, but that the inducement and encouragement was effective. It also follows that this activity constituted threats, coercion, and restraint of the respective employers, and that the object in

both cases was to cause Royse and other persons to cease doing business with Sharp Bros. and/or to force or require Sharp Bros. to cease using, handling or otherwise dealing in the products of Cupples and to cease doing business with B.D. and R., and to force or require B. D. and R. to cease doing business with Cupples.

It is equally clear that here the Respondent had no dispute with Sharp Bros. or Royse. The dispute was with Cupples, which is located in St. Louis, Missouri. Yet, the picketing was clearly aimed at the employees on the job site in Kansas City, Missouri. It is stipulated that McGee would testify that the picket sign was not only directed to the public, but to the contractors upon the job site, suppliers, architects, engineers, employees, and any and all persons having business at the job site (Stip., page 8, paragraph 20).

Apparently, Respondent contends that the employers and employees on the job site were possible consumers. This contention is answered by *Millmen & Cabinet Makers Union, Local 550, etc., (Steiner Lumber Company)*, 153 NLRB 1285, 1289, wherein the Trial Examiner states:

> "The term 'consumer' connotes in general a group of largely totally unknown individuals who can only be appealed to by a public display such as picketing or other advertising."

Additionally, as proof of Respondent's motive, it should be noted that on May 20. McGee was notified by the picket that "some of the people on the job wouldn't work" (Stip., page 5, paragraph 9). Yet, McGee continued the picket on the job on May 27, 1966. On May 27, McGee again knew employees were leaving the job (Stip., page 6, 7, paragraph 12). Work stoppages occurred again on June 1 and 2, 1966. Thus, McGee, on May 20, May 27, and June 1, knew the picket had caused work stoppages. Yet, in every instance, McGee again ordered the picket back on the job.

Accordingly, it must be held that McGee knew and intended to cause these work stopages. Clearly, after the work stoppage of May 20, the Union knew the "natural and forseeable consequences" of its picketing would be to cause other work stoppages; *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17, 52.

The conclusion that Respondent's picketing is violative of the Act is clearly supported by the following cases:

Cupples Products Corporation, 148 NLRB 1648. This case is closely in point and involves Cupples, the primary employer here. Many of the facts in that case are nearly identical with the Kansas City, Missouri, case. The Board there found the picketing was in support of an object proscribed by the Act and in violation of Section 8(b)(4)(i) and (ii)(B).

See also *Cupples Products Corporation*, 158 NLRB No. 145, wherein the picketing also took place at a time when no Cupples employees were on the job site. There, it was held the picketing failed to comply with the standards set forth in *Moore Dry Dock Company*, 92 NLRB 547, and was, therefore, proscribed. In that case, the Trial Examiner also found that, if the Respondent's defense was that its actions were statutorily privileged because it was engaged in "consumer picketing," as set forth in *N.L.R.B.* v. *Fruit and Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. 58, "then the short of it is that this pressure became devoid of legal protection when the employees of Modern, Seitz, and Peters-Eichler walked off the College job." (See page 6 of the Trial Examiner's Decision. These findings and conclusions were adopted by the Board.)

In *Alton-Wood River Building and Construction Trades Council, etc. (Alton District Independent Contractors and Associates)*, 154 NLRB No. 78, footnote 1, the Board stated:

> "We agree with the Trial Examiner that by merely naming the primary employer in the picket sign used

at the secondary site Respondents did not sufficiently confine the appeal so as to achieve immunity from the sanctions of Section 8(b)(4)(ii)(B). We find the picketing was not lawful under the *Tree Fruits* decision because, as stated by the Trial Examiner, 'the place . . . of the picketing demonstrates that it was aimed at the owners of Airwood Manor . . .' "

THE RESPONDENT'S POSITION

The Respondent apparently contends that it is engaged in consumer picketing, and relies upon *N.L.R.B.* v. *Fruit and Vegetable Packers, Local 760, (Tree Fruits)*, 377 U.S. 58. It is respectfully submitted that that decision does not apply to a construction site. In the *Tree Fruits* decision, the union picketed certain *retail* stores with signs requesting the *consumer public* not to purchase certain apples from the fruit packers with whom they had a dispute. Here, the Cupples products are not for sale at the job site. There is no consuming public here purchasing Cupples products at the job site. Even if there were "consumers" at, or near, the job site, there is no way they could respond to the union appeal at this location. At the construction site, the picketing must necessarily have a secondary object, and *Tree Fruits*, therefore, is inapplicable.

Moreover, even if the Respondent's contention should be accepted, it would have dire effects upon the construction industry. It would mean that *any* union which had a dispute with *any* company which manufactured *any* of the thousands of parts or materials used in the construction of buildings would be free to picket *any* construction site with immunity. This would subject practically every construction site in the country with work stoppages. This is what the Supreme Court must have had in mind in the *Tree Fruits* decision when it stated (377 U.S. at 70-71):

"The proviso indicates no more than that the Senate conferees' constitutional doubts led Congress to author-

ize publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him, *but not such publicity which has the effect of cutting off his deliveries, or inducing his employees to cease work. On the other hand, picketing which persuades the customers of a secondary employer to stop all trading with him was also to be barred.*" (Emphasis added.)

In sum, the stipulated facts here clearly indicate the picketing had a secondary object and *Tree Fruits* is inapplicable. However, even if the Board should conclude that *Tree Fruits* is applicable to construction sites as well as retail stores, it should still find that the picketing here falls within the ban of Section 8(b)(4)(i)(ii)(B) for the following reasons:

(a) Cupples products are not sold at this job site but are incorporated with other materials into the construction of the building.

(b) Neither Cupples, nor its employees, are on the job site.

(c) The public cannot respond to the Union's appeal at the construction site.

(d) The Respondent, after receiving notification that the picketing was causing work stoppages, still placed the picket back on the job on subsequent dates, and the Respondent must be held to have intended the natural and foreseeable consequences of its picketing, e.g., the subsequent work stoppages.

Conclusion

For the foregoing reasons, it is respectfully urged that the Board issue a Decision and Order finding the picketing at the construction site involved herein is in violation of Section 8(b)(4)(i)(ii)(B) with an appropriate Cease and Desist Order.

Respectfully submitted,

Robert L. Uhlig
Robert L. Uhlig
Counsel for General Counsel
National Labor Relations Board
Seventeenth Region
610 Federal Building
601 East 12th Street
Kansas City, Missouri 64106

Dated: October 24, 1966